IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 127

D. H. OVERMYER CO., INC., OF OHIO

and

D. H. OVERMYER CO., INC., OF KENTUCKY, *Petitioners*,

v.

FRICK COMPANY, A PENNSYLVANIA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, LUCAS COUNTY, OHIO

INDEX TO APPENDIX

APPENDIX FOR PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT

D. H. Overmyer Co., Inc. v. The Frick Company

Pertinent Docket Entries

C. P. Appearance Docket No. 408

Cause No. 204697

Pg. No.'s 197 A-4 A-12

Attorneys:

Shumaker, Loop & Kendrick—FRICK COMPANY, a corporation, *Plaintiff-Appellee*

Bugbee & Conkle—D. H. OVERMYER CO., INC., a corporation, *Defendants-Appellants*

1968

July 12—Petition, Warrant of Attorney Military Affidavit, Answer and praecipe filed.

July 12—Judgment as stated above and for costs. Jour. 392-78.

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc. 201 East 42nd Street, New York, New York, 10017. Certified Number 059724. Return receipt requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., a Kentucky Corp. 201 East 42nd Street, New York, New York 10017. Certified # 059723. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation Sys-

tem, 1036 Union Building, Cleveland, Ohio 44115. Certified # 059725. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation System, 1700 Kentucky Home Life Bldg., Louisville, Kentucky 40202. Certified # 059726. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Inc., 302 South Byrne Road, Toledo, Ohio 43615. Certified # 059727. Return receipt requested. Postage 50¢

July 22—Motion of defendants for New Trial, filed.

July 22—Motion of defendants to Stay Execution, filed.

July 22—Affidavit, filed.

August 6—Motion of defendant to Vacate Judgment Rendered on Warrant of Attorney, filed.

August 6—Answer of defendants and Cross petition of defendant D. H. Overmyer Co. an Ohio Corporation, filed.

Nov. 16—Motions to Stay Execution is overruled, for a new trial overruled. Demurrer of defendants to plaintiff's cause of action overruled. Jour. 401-154.

Dec. 4—Notice of Appeal and Praecipe filed. CA 6552

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

FRICK COMPANY, a corporation, 231 West Main Street, Waynesboro, Pennsylvania 17268, *Plaintiff*,

v.

D. H. OVERMYER CO., INC., a corporation, 302 South Byrne Road, Toledo, Ohio 43615,

and

D. H. OVERMYER CO., INC., a corporation, 1700 Kentucky Home Life Building, Louisville, Kentucky 40202,

Defendants.

Petition

1. Plaintiff is a Pennsylvania corporation qualified in accordance with the provisions of Ohio Revised Code Chapter 1703 to do business in Ohio.

2. D. H. Overmyer Co., Inc., Toledo, is an Ohio corporation which resides in and does business in Lucas County, Ohio. To the best of plaintiff's knowledge and to the best of its attorneys' knowledge, the last known Lucas County address of said defendant was and is 302 South Byrne Road, Toledo, Ohio 43615. Said defendant's statutory agent is C. T. Corporation System, 1036 Union Commerce Building. Cleveland, Ohio 44115.

3. D. H. Overmyer Co., Inc., Louisville, is a Kentucky corporation. To the best of plaintiff's knowledge and to the best of its attorney's knowledge, the last known address of said defendant's principal office was and is 201 East 42 Street, New York, New York 10017. Said defendant's statutory agent is C. T. Corporation System, Kentucky Home Life Building, Louisville, Kentucky 40202.

4. On June 1, 1967, defendants, acting through duly authorized officers, executed and delivered to plaintiff a

promissory note containing a warrant of attorney (hereafter the said promissory note is called the "Note") pursuant to which the defendants jointly and severally promised to pay to the order of plaintiff in twenty-one (21) equal monthly installments the principal sum of One Hundred Thirty Thousand Nine Hundred Seventy-seven Dollars ($130,977.00) plus interest thereon at the rate of 6% per year on an add-on basis, said interest to commence on June 1, 1967. A true copy of the Note is attached hereto, is designated Exhibit A, and is made a part of this Petition.

5. On May 1, 1968, defendants failed to pay to plaintiff the monthly installment payments required by the Note, and said failure to pay the monthly installment payments required by the Note has continued to this date.

6. By reason of defendants' failure as described in the immediately preceding paragraph, plaintiff, acting in accordance with the terms of the Note, hereby elects to and does hereby declare the entire remaining unpaid principal of the Note, namely, Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00), together with all interest thereon, immediately due and payable, presentment, demand, notice and protest having been duly waived by the defendants.

WHEREFORE, plaintiff prays for judgment against the defendants for the sum of Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00) with interest thereon at the rate set forth in the Note from the 1st day of May, 1968, until the Note is paid in full, and for costs of suit.

SHUMAKER, LOOP & KENDRICK

By /s/ ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.
Attorneys for Plaintiff
Suite 500—811 Madison Avenue
Toledo, Ohio 43624
Phone 241-4201

STATE OF OHIO
COUNTY OF LUCAS } ss:

Robert A. Jefferies, Jr., being duly sworn, says that he is the duly authorized attorney for said plaintiff, that the foregoing petition is founded upon an instrument in writing for the payment of money; that said instrument in writing is in his possession; and that he verily believes the statements contained in the foregoing instrument are true.

ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.

Sworn to before me by said Robert A. Jefferies, Jr., and by him subscribed in my presence this 12th day of July, 1968.

JOYCE A. KWIATKOWSKI
Notary Public

Joyce A. Kwiatkowski
Notary Public, Lucas County, Ohio
My Commission Expires 11-14-71

Exhibit A

INSTALLMENT NOTE

Amount: $130,977.00

New York, New York
June 1, 1967

For value received, the undersigned, jointly and severally, promise to pay to the order of Frick Company, a Pennsylvania corporation, at its office in Waynesboro, Pennsylvania, 17268, the sum of One hundred thirty-thousand nine hundred seventy-seven dollars ($130,977.00) in twenty-one (21) equal monthly installments of six thousand eight hundred and ninety-one dollars and eighty-five cents ($6,891.85) which installments include interest at the rate of six (6) per cent per annum on an add-on basis commencing June 1, 1967.

The first installment shall be payable June 1, 1967, and the remaining installments on the same date of each successive month thereafter, until this Note has been paid in full.

The Makers or any of them may, at their option, make prepayments on the principal amount of this Note without penalty; together with interest accrued to the date thereof. Prepayments shall be applied to the installments of principal due on this Note in the order of maturity.

The undersigned hereby waive presentment, demand, notice and protest of this Note.

The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or of its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default con-

tinues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days.

The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for a period of fifteen (15) days.

Payee agrees to remove any Mechanic's Lien or liens filed by the Payee against any property of the undersigned including three Affidavits of Lien which were filed on behalf of Frick Company in respect to its claim of $194,031.00 and which were recorded by the Recorder of Lucas County, Ohio as follows:

No. 501285, Volume of Lien Records 46, Page 468,
No. 501831, Volume of Lien Records 46, Page 520, and
No. 502867, Volume of Lien Records 36, Page 542.

D. H. OVERMYER CO., INC.
(a Kentucky corporation)

D. H. OVERMYER
D. H. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive Officer

D. H. OVERMYER CO., INC.
(an Ohio corporation)

SHIRLEY C. OVERMYER
Shirley C. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive Officer

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Appearance of Attorney for Defendants and Confession of Judgment

* * * * * * * * * * *

By virtue of the warrant of attorney contained in a certain promissory note annexed to this Answer and the petition filed herein by plaintiff, I, an attorney at law in the several courts of record of this State, do hereby enter an appearance for the above-named defendants who executed said promissory note and said warrant of attorney and who waive the issuing and service of process therein, and I do hereby confess a judgment in favor of said plaintiff, against said defendants, on said promissory note for the sum of Sixty-Two Thousand Three Hundred Seventy Dollars ($62,370.00), being the amount appearing due for the principal of said promissory note, plus interest thereon at the rate set forth in said promissory note from May 1, 1968, and also for costs of suit, taxed and to be taxed.

J. RONALL BOWMAN
Attorney for Defendants
402 Lof Bldg.
Toledo, Ohio
Phone No. 243-5227

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Judgment Entry

* * * * * * * * * * *

This day came Frick Company, plaintiff, by its attorney, Robert A. Jefferies, Jr.; also appeared in open court, for and on behalf of D. H. Overmyer Co., Inc., an Ohio corporation, one defendant herein, and D. H. Overmyer Co., Inc., a Kentucky corporation, the other defend-

ant herein, J. Ronald Bowman, an attorney at law of this court, and by virtue of a warrant of attorney annexed to the promissory note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said promissory note against said defendants and in favor of said plaintiff for Sixty-Two Thousand Three Hundred Seventy Dollars ($62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note, and for costs of suit taxed and to be taxed.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

(1) Plaintiff recover from D. H. Overmyer Co., Inc., an Ohio corporation, one of the defendants herein, the following sum (hereafter said sum is called the "Judgment Sum"):

> Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note (6% add-on interest computed over a 21-month period on a base sum of $130,977.00 or the equivalent of the said 6% add-on interest) together with costs herein expended, taxed and to be taxed; or

(2) Plaintiff recover from D. H. Overmyer Co., Inc., a Kentucky corporation, one of the defendants herein, an amount equal to the Judgment Sum or

(3) Plaintiff recover from each of the defendants such sums which, when totaled, will equal but not exceed the Judgment Sum.

/s/ NICHOLAS J. WALINISKI
Judge

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Notice of Judgment on Cognovit Note

Case No. 204697

• • • • • • • • • • •

To D. H. Overmyer Co., Inc., Defendant:

This is to inform you that a Judgment in the amount of $62,370 plus interest at the rate decreed in the Judgment Entry has been entered against you on a Cognovit Note in the above-captioned case in the Common Pleas Court of Lucas County, Ohio, on July 12, 1968. This notice is sent to you in compliance with Sec. 2323.13 (c) of the Ohio Revised Code.

LUCAS COUNTY COMMON PLEAS COURT

ROBERT KOPF, CLERK OF COURT

By /s/ BEULAH R. LONG
Deputy Clerk

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion for New Trial

* * * * * * * * * * *

Now come the defendants and move the court to vacate the judgment rendered on July 12, 1968, and for a new trial for the following causes which materially affect the substantial rights of defendants, to-wit:

1. Irregularity in the proceedings of the prevailing party and of the court by which defendants were prevented from having a fair trial.

2. The judgment is not sustained by sufficient evidence and is contrary to law.

3. Newly discovered evidence, material for the defendants, which with reasonable diligence they could not have discovered and produced at the trial.

And for other errors manifest from the face of the record.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

CERTIFICATE OF SERVICE

(Omitted)

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Affidavit

Joseph W. Westmeyer, Jr., being duly sworn, says that he is the attorney for the applicants for a new trial herein on the grounds of newly discovered evidence.

Affiant says that the judgment herein was entered by virtue of a warrant of attorney without notice to these defendants; that the consideration for the note upon which judgment was entered was the contract price agreed to be paid for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; and that because defendants had no notice of the entry of the court's judgment herein they could not with reasonable diligence have produced such material evidence prior to the court's entry of judgment.

JOSEPH W. WESTMEYER, JR.
Joseph W. Westmeyer, Jr.

Sworn to before me and subscribed in my presence this 22nd day of July, 1968.

ALLAN J. CONKLE
Notary Public
Lucas County, Ohio

Allan J. Conkle, Notary Public
State of Ohio—Attorney-at-Law
Unexpiring Commission
O. R. C. Sec. 14703

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion To Vacate Judgment Rendered on Warrant of Attorney

* * * * * * * * * *

Defendants respectfully move the court to vacate and set aside the judgment entered against them herein on the 12th day of July, 1968 during the present term of court, said judgment having been entered by virtue of a warrant of attorney without notice to these defendants.

Defendants say that they have a good defense to this action and the note on which judgment was rendered, as shown by their answer submitted herewith, which they request leave to file herein.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Answer of Defendants and Cross Petition of Defendant, D. H. Overmyer Co., Inc., an Ohio Corporation

* * * * * * * * * *

1. For answer to plaintiff's petition, defendants deny each, all and singular the allegations of said petition not hereinafter admitted to be true.

2. Defendant, D. H. Overmyer Co., Inc., an Ohio corporation, hereinafter called "Overmyer", on or prior to February 11, 1966, employed Nixon Construction Co., Inc., as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

3. On or about the 11th day of February, 1966, Nixon Construction Co., Inc., and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby

plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

4. Defendants say that the promissory note referred to in plaintiff's petition was executed as and for a part of the purchase price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) for a complete automatic refrigeration system furnished and installed by plaintiff pursuant to the contract in the cold storage warehouse being constructed for and proposed to be operated by Overmyer.

5. The said refrigeration system was not furnished and installed in accordance with the contract of purchase, in that plaintiff supplied materials, equipment and machinery of poor quality and design and negligently installed the same in an unworkmanlike manner, and Overmyer was required to, and did, engage other contractors to repair defects therein which resulted from the negligent work, design and defective materials.

6. The said refrigeration system was to have been a completely autonomous and automatic refrigeration system, but because plaintiff failed to comply with the contract, and because the said system was negligently installed by plaintiff, the system did not operate automatically. Overmyer was required to, and did, employ personnel to tend, maintain and control the system at all times.

7. The contract provided that said refrigeration system was to have been completed and ready for final acceptance on August 15, 1966, whereas plaintiff did not actually com-

plete the installation until March 17, 1967. Overmyer sustained lost profits because it was not able to operate the cold storage warehouse during the seven month period between the date provided for completion of the warehouse in the contract and the actual date of completion.

8. The refrigeration system installed by plaintiff was guaranteed and warranted by it to be free from defects in material and workmanship and to hold a temperature of minus 10° F. to within the limits of standard temperature controls, but, as installed, the said system was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

9. Because of the facts set forth in paragraphs numbered 5 through 8 above, Overmyer's expenses and losses exceeded the balance which plaintiff claims to be due on the note, and there was a failure of consideration for said note.

CROSS PETITION

First Cause of Action

10. For its cross petition against plaintiff, Overmyer incorporates all of the allegations of the foregoing answer as fully as though repeated herein.

11. Overmyer says that prior to February 11, 1966, it employed Nixon Construction Co., Inc. as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

12. On or about the 11th day of February, 1966, Nixon Construction Co., Inc. and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) to furnish machinery, equipment, labor, materials and supervision,

and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

13. Overmyer has duly performed all the conditions of the contract on its part.

14. Plaintiff breached the contract in that it performed its services in an incompetent, negligent and unworkmanlike manner, and in that it supplied materials, equipment and machinery of such poor design and quality that the refrigeration system furnished by plaintiff would not operate as represented by plaintiff and Overmyer was required and compelled to engage, and did, in fact, engage, other contractors to repair the defects existing in the refrigeration system; which defects existed solely because of the negligent work, design, and defective materials, equipment and machinery supplied by plaintiff.

15. By reason of the facts set forth in the first cause of action Overmyer has been damaged in the sum of Twenty-six Thousand Eight Hundred Dollars ($26,800.00).

Second Cause of Action

16. For its second cause of action, Overmyer incorporates each, all and singular the allegations contained in its first cause of action and further says that the machinery, equipment and materials designed, fabricated and supplied by plaintiff were to have constituted a completely autonomous and automatic refrigeration system.

17. Because of plaintiff's incompetent, negligent and unsatisfactory design and workmanship, and because plaintiff designed, fabricated and/or supplied machinery, equipment and materials unsuitable and inadequate to meet the

demands of the system, and because of plaintiff's breach of the contract, as aforesaid, the automatic refrigeration system, or integral and essential parts thereof, repeatedly broke down and became inoperative and failed to operate automatically and Overmyer was compelled and required to, and did, in fact, hire, engage and employ additional qualified personnel to tend, maintain and control the system at all times.

18. By reason of the facts set forth in the second cause of action Overmyer has been damaged in the sum of Nine Thousand Dollars ($9,000.00).

Third Cause of Action

19. For its third cause of action, Overmyer incorporates each, all and singular the allegations contained in its first and second causes of action and further says that in and by the contract, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said contract, and a part of the consideration for which plaintiff was paid the price set forth therein.

20. Plaintiff entered upon the performance of the work under said contract, but wholly and totally failed and neglected to complete the said work in the time specified in the contract for the completion thereof.

21. By reason of plaintiff's failure to complete the said work within the time specified in the contract, Overmyer was unable to have the construction of the cold storage warehouse completed, to take possession thereof, and to have the same occupied as a public cold storage warehouse, and Overmyer lost the use of such completed warehouse for approximately seven (7) months.

22. By reason of the facts set forth in the third cause of action, Overmyer has been damaged in the sum of Fifty Thousand Five Hundred Dollars ($50,500.00).

Fourth Cause of Action

23. For its fourth cause of action, Overmyer incorporates each, all and singular the allegations contained in its first, second and third causes of action and further says that, among other things, plaintiff guaranteed and warranted that, for a period as set forth in said contract, the machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10° F. to within the limits of standard temperature controls.

24. The said refrigeration system installed by plaintiff was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

25. Within the period set forth in the contract, and upon ascertaining that the said equipment was defective and inadequate, Overmyer demanded of plaintiff that it make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and plaintiff wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

26. Upon the failure, neglect and refusal of plaintiff to complete the aforesaid contract and warranty, Overmyer was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

27. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while Overmyer was ignorant of such facts, it paid to plaintiff the sum of Two Hundred Twenty-three Thousand and Six Dollars ($223,006.00), the total amount which it was required to pay to plaintiff under the aforesaid contract, in the form of cash and installment note.

28. By reason of the foregoing facts, Overmyer has been damaged in the sum of Eighty-six Thousand Three Hundred Dollars ($86,300.00).

WHEREFORE, defendants pray that plaintiff's cause of action be dismissed, and that judgment be rendered for defendant, Overmyer, against plaintiff in the sum of Eighty-six Thousand Three Hundred Dollars ($86,300.00), plus interest and for their costs herein expended.

BUGBEE & CONKLE

By /s/ ALLAN J. CONKLE
Allan J. Conkle
Attorneys for Defendants
2001 Toledo Trust Building
Toledo, Ohio 43604
Phone: 244-6788

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

G. R. Silcox says he is Vice-President for D. H. Overmyer Co., Inc., an Ohio corporation, and for D. H. Overmyer Co., Inc., a Kentucky corporation, and is duly authorized in the premises, and that the statements and averments contained in the foregoing answer and cross petition are true as he verily believes.

G. R. SILCOX

Sworn to before me and subscribed in my presence, this 31st day of July 1968.

GERALD N. GOLDBERG
Notary Public

Gerald N. Goldberg
Notary Public, State of New York
No. 31-6558320
Qualified in New York County
Commission Expires March 30, 1970

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Journal Entry

* * * * * * * * * *

This day this cause came on to be heard on the motions of the defendants to Stay Execution, for a New Trial and to Vacate Judgment and a demurrer to the petition and the same were submitted on the record, supporting memoranda, affidavits, exhibits and arguments of counsel.

Upon consideration thereof, and being fully advised in the premises the court finds that the Motion to Stay Execution, the Motion for a New Trial and the Motion to Vacate are not well taken. The court further finds that the demurrer is not well taken.

It is therefore, ORDERED, ADJUDGED and DECREED that the defendants' Motion to Stay Execution is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion for a New Trial is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion to Vacate Judgment is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' demurrer to the petition be overruled.

It is further ORDERED, ADJUDGED and DECREED that the Motion and Affidavit for examination of the debtors in aid of execution filed in this court on July 17, 1968, be in full force and effect and that any duly authorized officers of said corporations appear before this court at 10 AM on the 16th day of December, 1968 in courtroom # 3 and answer concerning all their assets including those items listed in the Motion and Affidavit filed in this court on July 17, 1968.

To so much of this order as is adverse to the interests of the defendants they object and except.

JOHN J. CONNORS, J.
Common Pleas Judge

Approved:

SHUMAKER, LOOP and KENDRICK
Shumaker, Loop and Kendrick
Attorneys for Plaintiff

BUGBEE and CONKLE
Bugbee and Conkle
Attorneys for Defendants
Approved as to Form Only

Court of Appeals: Assignment of Error, No. 2

"It is a denial of Appellants' rights to due process under the State and Federal Constitutions to be denied an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term."

IN THE COURT OF APPEALS, LUCAS COUNTY, OHIO

CA No. 6552

Journal Entry

* * * * * * * * * *

This cause came on to be heard on appeal on questions of law from the judgment of the Common Pleas Court, Lucas County, Ohio; and the same was submitted to this Court on the original papers, the record, the Bill of Excep-

tions, the Affidavits and Exhibits presented in the Common Pleas Court and arguments of counsel.

The Court, being fully advised in the premises, finds that the trial Court, with no abuse of discretion, properly overruled the defendants-appellants motion to vacate the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Common Pleas Court of Lucas County, Ohio, is affirmed at costs of the defendant-appellants; and the cause is remanded to that Court for execution of judgment.

To all of which defendants-appellants except.

CLIFORD F. BROWN
Judge of the Court of Appeals, Presiding

HARVEY G. STRAUB
Judge

JOHN W. POTTER
Judge

Filed
Court of Appeals
Sep. 22, 1969

Approved:

BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants-Appellants

SHUMAKER, LOOP & KENDRICK
JAMES M. TUSCHMAN
Attorneys for Plaintiff-Appellee

Proposition of Law No. 5:

It is a violation of the right of trial by jury provided by *Section 5, Article I, of the Ohio Constitution* and of the right to due process of law provided by the *Fourteenth Amendment to the United States Constitution* for a trial court to deny a jury trial to the maker of a note who tenders a validly stated defense against the original holder thereof who has taken a judgment on a warrant of attorney when the trial court refuses to take evidence on the merits of the defense before deciding whether to vacate the judgment.

Authorities cited in support of Proposition of Law No. 5:

Fourteenth Amendment to the United States Constitution

* * * * * * * * * *

Sniadach v. *Family Finance Corporation of Bay View*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820, 37 Law week 4520 (1969)

The Supreme Court of the State of Ohio

1969 Term, To Wit: December 17, 1969 No. 69-720

JOURNAL 49, Page 677 APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its cost herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Ohio Revised Code

Section 2323.13 Warrant of attorney to confess.

"(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition." (As amended, effective 12-1-67)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1970

No. 137

D. H. OVERMYER CO., INC., OF OHIO

and

D. H. OVERMYER CO., INC., OF KENTUCKY,

Petitioners,

v.

FRICK COMPANY, *Respondent.*

Respondent's Designation of the Record To Be Included in the Appendix

* * *

To: Russell Morton Brown, Esquire
508 Federal Bar Building
Washington, D. C. 20006

Pursuant to Supreme Court Rule 36(2), respondent hereby designates the following portions of the record to be included in the Appendix:

(1) The following additional pertinent docket entries of the Common Pleas Court of Lucas County, Ohio to be added to the petitioners' designation:

1968

July 22. Motions for new trial and to stay execution set for hearing on August 5, 1968 at 1:30 p.m. before Judge Connors. Jour. 392-201*

August 6. Memorandum in Opposition to Defendants' Motion to Stay Execution and Motion for a New Trial filed.

August 15. Affidavit of Paul C. Guth filed.

* Hearings held on August 15, 1970 and September 5, 1970.

August 15. Affidavit in Opposition to Motion to Stay Execution and for a New Trial filed.

August 15. Affidavit in Opposition to Motion to Stay Execution filed.

August 21. Supplemental Memorandum in Opposition to Defendants' Motion to Stay Execution, Motion for New Trial and Motion to Vacate Judgment filed.

August 22. Defendants' Memorandum in Support to Vacate Judgment filed.

August 22. Demurrer of Defendants to Plaintiff's Cause of Action filed.

November 27. See Execution Doc. 23, page 347, EX No. 23847.

December 3. Motion for Stay of Execution and to Fix Supersedeas Bond filed.

December 3. Bond filed.

1969

March 3. Oral motion for Nunc Pro Tunc entry. Jour. 409-265.

(2) Excerpt from transcript from hearings in the Common Pleas Court of Lucas County, Ohio of August 15, 1968 and September 5, 1968. (See Item I attached).

(3) Defendants' Motion to Stay Execution filed in the Common Pleas Court of Lucas County, Ohio. (See Item II attached).

(4) Affidavit of Howard F. Burpee and exhibits. (See Item III attached).

(5) Affidavit of Paul C. Guth and exhibit. (See Item IV attached).

(6) Affidavit of Paul C. Guth and exhibits. (See Item V attached).

(7) Index from Defendants' (Overmyer) Memorandum in Support of Motion to Vacate filed in the Common Pleas Court of Lucas County, Ohio. (See Item VI attached).

(8) Excerpt of Journal Entry filed in the Common Pleas Court of Lucas County, Ohio on March 3, 1969. (See Item VII attached).

(9) Defendants-Appellants' (Overmyer) Motion for Reconsideration filed in the Court of Appeals of Lucas County, Ohio. (See Item VIII attached).

(10) Defendants-Appellants' (Overmyer) Motion to Certify the Case to the Supreme Court of Ohio filed in the Court of Appeals of Lucas County, Ohio. (See Item IX attached).

(11) Defendant-Appellants' (Overmyer) Application for Conclusions of Fact filed in the Court of Appeals for Lucas County, Ohio. (See Item X attached).

(12) Journal Entry filed in the Court of Appeals of Lucas County, Ohio denying defendants-appellants' (Overmyer) Motion to Certify, Application for Conclusions of Fact and Motion for Reconsideration. (See Item XI attached).

(13) Mandate from the Supreme Court of Ohio to the Common Pleas Court. (See Item XII attached).

SHUMAKER, LOOP & KENDRICK

ROBERT B. GOSLINE
Robert B. Gosline
JAMES M. TUSCHMAN
James M. Tuschman
811 Madison Avenue, Suite 500
Toledo, Ohio 43624
241-4201
Attorneys for Respondent.

April 16, 1971

Excerpts From Transcript From Hearings in Common Pleas Court of Lucas County, Ohio, of August 15, 1968 and September 5, 1968

ITEM I

DEFENDANTS' BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the hearing of the above-entitled cause, in the Court of Common Pleas of Lucas County, Ohio, in the April, 1968 Term of said Court, on Thursday, August 15, 1968, before the Honorable John J. Connors, Jr., one of the Judges of said Court, the following proceedings were had, to-wit:

• • • • •

(13) Mr. Tuschman: Your Honor, as to the motion for temporary injunction, I have the opinion rendered by the United States District Judge, and he has stated here, Judge Walter Mansfield, the United States (14) District Judge in New York rendering his opinion on the motion for temporary injunction, his conclusion of law:

> "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit. No basis for equitable relief in the form of a stay or injunction is indicated. Plaintiffs' suit is limited to an action of damages, and there is no showing that it would suffer any irreparable injury as a result of defendant's enforcement of the security. The effect of granting relief would be to prevent the institution of court proceedings in Florida and Kentucky in violation of the policy enunciated in Title 28, U.S.C. Section 2283,"

and they state at the bottom,

> "This shall constitute the Court's finding of fact and conclusions of law, Judge Mansfield."

I have a certified copy of the Judge's opinion in that case, Your Honor.

• • • • •

(25) Mr. Wolfe: • • •

I would submit if Mr. Tuschman would like to argue now about the pleading of a valid defense, a valid legal defense, we have not set up only counterclaims. We have asserted counterclaims but we have also set up a valid legal defense on that note and that lies in failure of consideration.

(32) Mr. Wolfe: Yes. We have an affidavit here, but our affidavit, quite frankly, does not go to the pleading aspect of the case. It goes to the merits of the case.

The Court: Well, I think in all fairness what you should do is be given the opportunity to look at what Jim has just filed today—

Mr. Tuschman: I will furnish him with copies, Your Honor.

The Court: —and if you want time to file a brief and memorandum in opposition to this, you are entitled to do that.

If you want oral argument on that, all right. If you want to submit it, I will make my decision on what you filed.

(35) The Court: How much time will you need to get in whatever you have to get in in opposition to what Jim has just filed today?

Mr. Wolfe: We will do what is reasonable with the Court.

(36) Mr. Tuschman: Can we state a date then?

The Court: I want to give him a reasonable time to file whatever he wants to.

Mr. Tuschman: A week?

Mr. Wolfe: A week will be fine.

The Court: You have whatever you want filed by a week from today.

• • • • •

(38) Thursday, September 5, 1968. Court Room No. 3, Lucas County Court House, Toledo, Ohio, 2:15 o'clock P.M.

The Court: Cause No. 204697, Frick Company versus D. H. Overmyer Company, Inc., et al. You make whatever

argument you want at this time, for the record, and I will take the case under advisement and give you my decision. So who wants to proceed.

• • • • •

(67) Mr. Garrigan: I beg the Court's pardon, I didn't mean to object so strenuously. I, myself, have filed fifteen suits on behalf of Overmyer in New York. But Overmyer in three years built 180 warehouses in thirty states. There aren't hundreds of contracts, there are tens of thousands of contracts with many contractors.

ITEM II

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Motion To Stay Execution

• • • • • • • • • • •

Defendants respectfully move the court to stay execution of and any procedure to enforce the judgment entered herein on the 12th day of July, 1968 pending the filing of a Motion for a New Trial and/or a Motion to Vacate said Judgment, and the disposition thereof.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

ITEM III

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Howard F. Burpee

(Filed: August 15, 1968)

• • • • • • • • • • •

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

Howard F. Burpee, being duly sworn, deposes and says that:

(1) I am an engineer in the New York office of Frick Company, plaintiff herein, and I am submitting this affidavit in opposition to the motion of defendants herein to stay execution and the related motion for a new trial in the above action. I am informed and believe that judgment in favor of plaintiff was made and entered by and in this Court on July 12, 1968.

(2) The contract dated February 11, 1966 (referred to in the affidavit of Joseph W. Westmeyer, Jr., Esq.) between plaintiff Frick Company (hereinafter "Frick") for the construction of a refrigeration system in defendant Overmeyer's warehouse located at 3630 South Street, Toledo, Ohio was negotiated by me. Subsequent to negotiations and the execution of said contract, I was in general charge of this matter for the New York office. By reason of my participation in the negotiations and subsequent responsibility for this job, I am fully familiar with the facts hereinafter set forth. Copy of such contract is annexed hereto as Exhibit I. Such contract and the documents incorporated therein will hereinafter sometimes be referred to as the "Contract".

(3) I am informed and believe that Mr. Westmeyer's affidavit which is the basis for the instant motions in effect concedes that the note upon which the judgment was entered

herein was given in payment "for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; . . . .". I am informed and believe that Mr. Westmeyer then states in his affidavit that at the new trial "defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; . . ."

(4) As will appear from the facts hereafter set forth in this affidavit and the exhibits thereto, these motions are totally devoid of merit and an obvious last ditch effort to impede and hinder the plaintiff from collecting the price payable under the Contract which in accordance with its original terms should have been paid in full more than a year and eight months ago. In addition, any stay of execution herein will deprive Frick of the security (i) upon which Frick insisted as a condition for completing the installation after defendant had defaulted in making the payments required under the Contract during the construction period; and (ii) on the basis of which Frick twice extended the date for complete payment of the full price provided for originally by the Contract.

A. The Background of this Action.

(5) Frick is engaged in the business of manufacturing and installing refrigeration equipment. By the Contract, Frick agreed with Nixon Construction Company (hereinafter "Nixon") to install the refrigeration equipment of the Toledo warehouse of D. H. Overmyer Co., Inc. (hereinafter "Overmyer"). Due to Nixon's unstable financial condition, defendant required that Nixon's obligation under the Contract be guaranteed by Overmyer.

(6) Although the relationship between Nixon and Overmyer was ostensibly that of general contractor and owner,

I am informed and believe that Nixon was in fact a wholly owned subsidiary of Overmyer. As a matter of fact the general contractor's work was not carried out by Nixon, but by a corporation known as Green & White Construction Company, Inc. ("Green"). Nixon was a subsidiary of Green and in January 1967, Overmyer purchased the stock of Green and as a result, Nixon was absorbed into Overmyer. The necessity for this action was apparently the result of Nixon's inability to meet its obligations, and annexed hereto as Exhibit 1 is letter dated January 16, 1967 from Overmyer informing Frick and other suppliers of its acquisition of Green in order that Green (and Nixon) "would be able to fully satisfy its obligations to you * * *."

(7) Frick encountered considerable difficulties on this job. The building was behind schedule with the result that Frick was delayed in making its installation. In addition, and of great importance to Frick, was the fact that Nixon failed to make the progress payments required under the Contract. This resulted in repeated requests for moneys owed and a series of unkept promises that Frick would be paid. As a result, on September 30, 1966 Frick telegraphed Overmyer pointing out that although invoices for progress payments through August 31, 1966 "in the amounts of $148,471 have been submitted, payment of only $28,969 has been received." A copy of the aforesaid telegram is annexed hereto as Exhibit 2 and annexed hereto as Exhibit 3 is letter dated October 3, 1966 together with the invoices referred to therein, which represents a statement of Frick's account as of September 30, 1966.

(8) Green attempted to further delay payment of the amounts payable to Frick as of September 30, 1966 which had been guaranteed by Overmyer. This was done by a claim that the invoice should have been sent to Green's Toledo office and not to Green's New York office as was required by the Contract and as had been done by Frick without objections in the case of earlier invoices. A copy

of the mimeographed notice from Green is annexed hereto as Exhibit 4. Frick complied with such request, as appears from its letter dated October 7, 1966, copy of which is annexed hereto as Exhibit 5, but pointed out the inappropriateness of the procedure followed by Green. When no payments of the amounts payable by September 30, 1966 were received by October 10, 1966, Frick stopped the work on the project and gave notice thereof to Green by letter dated October 10, 1966 which is attached hereto and made a part hereof as Exhibit 6. It is to be noted that parts of the amounts payable on September 30, 1966 had been payable at dates prior to September 30, 1966.

(9) As a result of such failure to make payments in accordance with the Contract, Frick filed mechanics liens on November 3, 1966 covering the Overmyer warehouse property which liens were filed on November 3, 1966 in a total amount of $194,031.

(10) Subsequent to the filing of these liens, Overmyer requested Frick to go forward with the work and Frick agreed to do this on the basis of Overmyer's agreement to pay Frick 10% of the amount owed ($19,403.10) with the balance represented by a promissory note payable in 12 equal monthly installments of $15,498.23. Such Note was to be executed by The Overmyer Company, Inc., a New York corporation, which I believe to be in control of, controlled by, or under common control with Overmyer. That arrangement was confirmed by letter dated January 24, 1967 from Frick to Overmyer, a copy of which is annexed hereto as Exhibit 7. Overmyer delivered the Note so executed to Frick in a letter dated February 16, 1967 wherein it was requested that Frick begin "work immediately * * *." A copy of the aforesaid Note is annexed hereto as Exhibit 8 and letter of February 16, 1967 is annexed hereto as Exhibit 9.

B. The Completion of the Job by Frick on March 17, 1967 and its Acceptance by Overmyer which under the Contract Preclude any Claim for the Alleged Poor Design or Quality of the Refrigeration System

(11) On March 17, 1967 Frick had performed all of its work under the Contract and sent to Nixon a "notice of completion". Attached to this notice is an acceptance executed by Overmyer's general manager in Toledo, on behalf of Marion Willis, Overmyer's Vice President of refrigeration, which states:

"Gentlemen:

This is to inform you that your Erector, Mr. Ira C. Coleman has completed in a satisfactory manner all work of supervision and or erection and demonstration specified in contract with you dated 2/11/66, and that the said work as well as the machinery and apparatus specified in said contract, is hereby accepted as per the contract conditions.

Yours truly,"

A copy of this notice of completion and acceptance is annexed hereto as Exhibit 10.

(12) The Contract provides in article 20 of the "Conditions of Sale" that after the machinery and equipment have been installed, then Frick shall notify the Buyer (Nixon) that the machinery and equipment "are ready for demonstration". Article 20 then provides that after demonstration, if the machinery and equipment performs according to the contract "and the guarantees if any therein" *then*

". . . *Buyer is to give the Seller an unconditional written acceptance which acceptance shall constitute a waiver by the Buyer of all claims other than those which may arise from Seller's warranty in Articles 1 and 2 of this Agreement.*" (Italics supplied)

(13) As appears from the foregoing, acceptance of the machinery and equipment constitutes a waiver by Overmyer of all claims against Frick except such claims as are covered by the warranties contained in articles 1 and 2 of the Contract.

(14) Article 1 of the Contract warrants machinery and equipment manufactured by Frick to be free from defects in materials and workmanship. Frick assumes the obligation to repair or replace any defective material manufactured by Frick f.o.b. its plant after such defective machinery or equipment had been so returned to its plant. Frick Company's warranty with respect to machinery or equipment not manufactured by it is limited to the liability of its own suppliers.

(15) Article 2 of the contract specifically provides as follows:

> "The Seller shall not be liable for any losses, damages, or delays caused by any defect, except to furnish duplicate parts in accordance with the above warranty. Buyer agrees that Seller shall not be liable for any damages to Buyer or to a third person arising out of the presence of the installed machinery and equipment on Buyer's premises, or out of the use or operation thereof. In no event shall Seller be held liable to Buyer for consequential damages.
>
> None of the warranties by the Seller contained herein shall be enforceable against the Seller if the Buyer shall default in making settlement of the purchase price hereunder or any of the payments required to be made by the Buyer to the Seller hereunder."

(16) The foregoing demonstrates that under the Contract, Frick has no liability on account of the alleged "poor design and quality of the system", the ground on which a new trial is sought. Frick's sole obligation is to furnish

to the buyer "duplicate parts in accordance with the above warranties." Under no circumstances can Frick be held liable at this time for the alleged failure to meet the specifications of the Contract.

(17) It is to be noted that Mr. Westmeyer's affidavit (the basis for the instant motions) does not make any claim that Frick refused to repair or replace any deficient materials in accordance with its obligations under the Contract.

There could be no basis for any such claim. This is demonstrated by a letter by Overmyer dated March 6, 1968, copy of which is annexed hereto as Exhibit 11. As appears from such letter, as of such date and eleven days prior to the expiration of the warranty period (March 17, 1968) Overmyer claimed the sum of $7,556.72 for repairing equipment installed by Frick. Such letter does not specify the equipment on account of which the claim is made and does not state that such expenses were incurred after Frick's refusal to repair or replace the equipment. The claim therein made is refuted by Frick's answer dated March 8, 1968, copy of which is annexed hereto as Exhibit 12. I am informed and believe that Overmyer never denied Frick's contention that the amounts so claimed by Overmyer probably represent expenditures incurred in rewinding the electric motors installed by Frick. Such rewinding was necessitated by Overmyer's insistence that such motors be wired for 440 volts, despite the fact that the current actually supplied would be 480 volts. The fact that such an installation would create difficulties was repeatedly called to the attention of Overmyer who, nevertheless, insisted on 440 volt motors. Attached hereto as Exhibit 12a is copy of a letter by me to Overmyer containing my last warning on this subject matter. Certainly the existence of a $7,556.72 claim (even if undisputed which it is not) should not affect the collection of a $62,370 judgment.

(18) The claims of poor design, poor quality and failure to meet specifications are the sheerest after-thought. This

is demonstrated by the arrangement which was finally entered into between Frick and Overmyer—an arrangement which the defendant is now attempting to repudiate.

C. After the Installation had been Completed and Accepted on March 17, 1967, Overmyer Approached Frick and Asked that it Release the Mechanics Liens Previously Referred to.

(19) After acceptance of the installation (Paragraph (11)) discussions were held between Frick and Overmyer which resulted in the following agreement:

(a) Execution by Overmyer of the installment note in the amount of $130,977 and dated June 1, 1967 on which judgment was rendered herein on July 12, 1968. This Note required complete payment of the outstanding amounts due to Frick in 21 monthly installments ending March 1969—two full years after the completion by Frick of the job. As a result of this arrangement, Overmyer's monthly payments to Frick were reduced from $15,498.23 to $6,891.85 and the rate of interest on the indebtedness was reduced from 6½% to 6%;

(b) The release by Frick of its lien on the Toledo warehouse;

(c) The securing of Overmyer's liabilities by second mortgages on real estate located in Hillsboro County, Florida and Jefferson County, Kentucky.

(20) The foregoing arrangement was confirmed by letter from Overmyer's general counsel dated June 23, 1967, copy annexed hereto as Exhibit 13.

(21) It was not until October 2, 1967 that the executed original of the installment note dated June 1, 1967 was sent to Frick together with (a) check for the installments of the Note then due; and (b) letter from Overmyer's

general counsel confirming instructions to Overmyer's local attorneys in Tampa and Louisville to record the second mortgages "previously agreed upon." A copy of this letter is annexed hereto as Exhibit 14.

(22) As appears from the foregoing, Overmyer, which was unable to meet its obligations to Frick, succeeded in negotiating a very generous extension of time in which to pay off its indebtedness to Frick and in addition, and of obvious importance to Overmyer, it obtained from Frick a release of the lien on the Toledo warehouse. Your deponent is informed and verily believes that Frick, in accordance with its agreement with Overmyer, filed a release of its mechanics liens on November 3, 1967.

D. Defendant's Sole Motive for the Instant Motions is to Further Delay Collection of Frick's Just Claim.

(23) The transparent nature of these motions is demonstrated by the fact that none of the claims asserted in Mr. Westermeyer's affidavit were made at the time Overmyer executed the second mortgages and the installment note on which judgment was rendered herein, six months after the installation of the equipment and commencement of its operation. No claim was made by Overmyer at that time that Frick's installation was done in a negligent manner or was "of a poor design and quality . . .". As appears from Exhibit 14 (letter from Overmyer dated October 2, 1967) Overmyer's sole concern was that it obtain an extension of time to pay an admitted indebtedness and, of great importance to it, to get from Frick a release of its liens.

(24) As appears from Exhibit 11, Overmyer's claim against Frick eleven days prior to the expiration of the warranty period aggregated $7,556.72. I am informed by Frick and believe that Overmyer was in default of its

obligations under the Note on which judgment was rendered herein on June 1, 1968. Accordingly, under the terms of such Note, Frick could have commenced this action and entered judgment therein not later than June 16, 1968. Thereafter, I am informed and believe, on June 14, 1968 Overmyer instituted an action against Frick in the United States District Court of New York for an aggregate recovery of $132,100 for damages sustained by Overmyer on account of the installation of the refrigeration system substantially for the reasons set forth in Mr. Westmeyer's affidavit herein. Thus, Overmyer claims in effect that its damages between March 7, 1967 (more than eleven months after completion of the installation) and the end of the warranty period increased by an amount in excess of $125,000. I am informed and believe that in connection with such action, Overmyer obtained a stay in the United States District Court for the Southern District of New York which prevented Frick from enforcing its Note by the action herein until July 5, 1968 when such stay was vacated by the same United States District Judge who had granted it. I am informed and believe that such stay was vacated in part on the basis of an affidavit signed by me which substantially incorporated the facts set forth and papers annexed to this affidavit.

(25) The facts set forth in this affidavit as well as the timing of the action brought in the United States District Court clearly demonstrate that Overmyer's only purpose in bringing the New York action (which is based substantially on the same claims as the defenses set forth in Mr. Westmeyer's affidavit) was to delay the entry of a judgment herein which would enable Frick to enforce its just claims. In bringing these motions, Overmyer is clearly pursuing the same objective with the same insubstantial and unsupported allegations set up as defenses.

E. Granting the Relief Asked for by Overmyer on these Motions will Gravely Prejudice Frick.

(26) A stay of execution or an order for a new trial will greatly prejudice Frick since it will deprive Frick of the consideration which it received for twice extending the date when the amounts due to plaintiff from defendants became payable. Under the Contract payment of the contract price was to be completed 30 days after "completion of all work included and in approval and acceptance thereof by the owner and the general contractor . . .". Since such work was completed and accepted by the owner on March 17, 1967 (Exhibit 10 hereto) payment should have been made not later than April 16, 1967. However, as more fully set forth in paragraph 10 hereof, prior to such completion, the plaintiff had accommodated the owner by extending payment of $174,627.90 of the purchase price through March 1, 1967. Thereafter Frick agreed to further extend the period for complete payment of its claims to a 21 months' period following March 1, 1967. This in effect reduced the monthly payments required of Overmyer from the $15,498.23 required under the February arrangement to $6,891.85. As consideration for such extension, Frick demanded the instant judgment note which entitled it to take judgment in the courts of Ohio if Overmyer's default under the note continued for 15 days. It is this security of which Frick would be deprived if the instant motions were granted.

(27) In this connection, I respectfully refer the Court to Exhibit 6 attached to this affidavit. Such Exhibit is the notice by Frick dated October 10, 1966 that it was discontinuing work on the installation because of the existing default in making the payments required by the Contract. In paragraph 2 thereof Frick agreed to continue the work on payment of " . . . $35,000 in cash, provided the balance can be evidenced by interest bearing *judgment notes.*"

(emphasis ours). Thus the ability to enforce its claim against Overmyer by immediate judgment in case of default was a condition precedent to the accommodations given Overmyer and Frick's willingness to go forward with completion of the installation without receiving the payments provided for under the Contract. Immediate resort to such security is even more imperative in Frick's view by reason of the financial irresponsibility of Overmyer shown by the history of its dealings with Frick and Frick's belief that Overmyer is now in financial difficulties resulting in nonpayment of obligations to other creditors.

(28) There is no allegation in any of the papers in support of these motions that Frick which has been in business since 1853 would be unable to respond to any judgment which Overmyer may obtain against it. Accordingly, denial of the motions can not prejudice Overmyer, particularly in view of the action which Overmyer chose to bring in the United States District Court in New York.

For the reasons above set forth, I respectfully submit that the motions made on behalf of the defendants herein should be denied.

/s/ HOWARD F. BURPEE
Howard F. Burpee

Sworn to before me this
29 day of July 1968.

MARY P. DILLON
Notary Public, State of New York

EXHIBIT 1

EXCERPT OF EXHIBIT I—CONSTRUCTION CONTRACT BETWEEN FRICK CO., AND NIXON CONSTRUCTION CO., D. H. OVERMYER CO., INC.

ARTICLE 1: WARRANTY

The Seller warrants, for a period of one year from date of completion machinery and equipment manufactured by the Seller to be free from defects in material and workmanship when the machinery and equipment has been operated in accordance with the Seller's recommendations. The Seller agrees to repair or replace, at the Seller's option, F.O.B. Waynesboro, Pa., any part manufactured by the Seller that in the judgment of the Seller was defective at the time of shipment provided the part is delivered by the Buyer to Frick Company at Waynesboro, Pa., transportation prepaid. The Seller warrants machinery and equipment furnished by the Seller but manufactured by others only to the extent that the Seller can enforce liability against the manufacturer thereof. The foregoing is in lieu of all warranties express or implied.

ARTICLE 2: SELLER'S LIMITATION OF LIABILITY

The Seller shall not be liable for any losses, damages, or delays caused by any defect, except to furnish duplicate parts in accordance with the above warranty. Buyer agrees that Seller shall not be liable for any damages to Buyer or to a third person arising out of the presence of the installed machinery and equipment on Buyer's premises or out of the use or operation thereof. In no event shall Seller be held liable to Buyer for consequential damages.

None of the warranties by the Seller contained herein shall be enforceable against the Seller if the Buyer shall default in making settlement of the purchase price hereunder or any of the payments required to be made by the Buyer to the Seller hereunder.

SPACE FOR INDUSTRY
D. H. OVERMYER CO., INC.

201 EAST 42ND STREET N. Y., N. Y. 10017 212 867-2170

January 16, 1967

To: Sub-Contractors and Suppliers of Green & White Construction Company, Inc. and Nixon Construction Co., Inc.

In past correspondence with you Green & White Construction Company, Inc. has advised you of our option to purchase the stock of their corporation and its subsidiary.

We are pleased to advise you at this time that we have decided to exercise our option to purchase the stock of Green & White Construction Company, Inc. (including its wholly-owned subsidiary, Nixon Construction Co., Inc.) In connection therewith, we will make a very substantial cash contribution to the capital of Green & White Construction Company, Inc.

Very shortly thereafter Green & White will be sending you its first check toward the payment of its account with you.

Under this plan, and with our assistance, Green & White will, in a reasonable period of time, be able to fully satisfy its obligations to you and it is our intention to see that this is accomplished as quickly as possible.

Very truly yours,

D. H. OVERMYER CO., INC.
By: D. H. OVERMYER
D. H. Overmyer,
Chairman of the Board

EXHIBIT 2

Telegram, Sept. 30, 1966, Frick Company to D. H. Overmyer Co.

WAYNESBORO

TELEGRAM TELEGRAM TELEGRAM

Waynesboro, Pennsylvania
September 30, 1966—4:30 p.m.

D. H. Overmyer Co.
New York, New York
201 E. 42nd Street

Att: D. H. Overmyer, President

As guarantor for payments on the contract between the Frick Company and the Nixon Construction Company, we call your attention to the following. Invoices for progress payments on labor and material thru Aug. 31, 1966, in the amounts of $148,471 have been submitted. Payment of only $28,969 has been received.

Frick Company has now substantially completed its contract. Absence of power wiring to the compressors as of 4:00 p.m. today prevents completion of the last step before operation which is charging of the system with refrigerant.

EXHIBIT 3

Letter, Oct. 3, 1966, Frick Company to Nixon Construction Company.

October 3, 1966

Nixon Construction Company
201 East 42nd Street
New York, New York 10017

Re: Your Order 6306
Our Order 230046

Gentlemen:

Our invoice number 609-2310F dated September 30 is enclosed for $74,529 which represents our final billing under the above referenced order.

We are enclosing our requisition No. 5 for the month of September in the amount of $95,001.10. We will look forward to your making payment of this amount in accordance with the terms of the order.

Your remittance in the amount of $104,654.90 we trust will reach us not later than this week so that we may proceed to complete final steps as mentioned in our Mr. Glen's telegram of September 29 to you.

Very truly yours,

FRICK COMPANY
Credit & Collection Department

RRLesher:cm

cc: H. F. Burpee
M. A. Black, Jr.

SPECIAL DELIVERY

EXHIBIT 4

GREEN & WHITE CONSTRUCTION COMPANY
P. O BOX 1750
GRAND CENTRAL STATION
NEW YORK, N.Y. 10017

10/4/66

Gentlemen:

We are returning your invoice(s) numbered 609-231 OF. It is our policy to return invoices that have been submitted direct to New York. To avoid any unnecessary delay in payment, please submit the invoice(s) to the local branch office in accordance with our contract number 6306, dated 2/11/66. Vendors name Frick Company. The invoice(s) will then be approved locally and forwarded to New York for payment.

Sincerely,

HAROLD BARCLAY
Accounts Payable Department

EXHIBIT 5

October 7, 1966

Nixon Construction Company
c/o Green and White Construction Company
302 South Byrne Road
Toledo, Ohio

Re: Your 6306
Our 230046

Gentlemen:

We mailed special delivery to Nixon Construction Company, 201 East 42nd Street, New York City our letter of October 3, 1966 enclosing our invoice number 609-231OF dated September 30, 1966 for $74,529 together with our

requisition number five dated October 3, 1966 for $95,001.10. Our letter with the aforementioned have been returned to us with a form letter of Green and White Construction Company dated October 4. They request that our invoice and requisition be sent "to the local branch office" as is "our policy". Accordingly we enclose these with this letter. In doing so we want to point out that your contract number 6306 does not specify such a procedure. Previous invoices submitted by us were sent to your New York City office and were not returned.

We also want to point out your contract paragraph six, item A, specifies amounts requested for payment shall be submitted not later than the 5th of the month and payable "thirty days after the date received in the New York City office". Our requisition number five requesting payment of $95,001.10 was received by you in New York City before the 5th of October 1966. To substantiate this your form letter is dated October 4, 1966 and the postmark on the envelop returning these papers to us is October 5, 1966. Therefore, we will expect payment of the $95,001.10 thirty days after October 5, or on November 5, 1966.

A copy of this letter is being sent to your New York City office.

Very truly yours,

FRICK COMPANY

Credit & Collection Department

RRLesher:cm

cc: M. A. Black, Jr.
Howard Burpee
Nixon Construction Co.—New York City

EXHIBIT 6

Letter, October 10, 1966, Frick Company to Green & White Construction Company.

October 10, 1966

Green & White Construction Company
201 East 42nd Street
New York, N. Y. 10017

Attention: Mr. O. B. Spence
Vice President, Special Projects

Gentlemen:

Subject: Nixon Construction Co.
For Overmyer Warehouse, Toledo
Frick Order 230046

This letter will confirm our phone conversations of Friday, October 7, wherein I advised as follows:

1. Our management has directed us to discontinue work on this project unless arrangements can be made to straighten out the past-due payments covered under the contract.

2. In lieu of actual cash, Frick Company has indicated their willingness to accept your offer of $35,000 in cash, provided the balance can be evidenced by interest-bearing judgment notes. This arrangement would have to be worked out with our Financial Department, but the management has agreed to this in principle.

3. Until such time as this situation has been resolved, the construction activity has been directed to not continue with the charging of the plant which we are ready to do at this time, and to discontinue all activities until the problem has been settled.

We hope that you will understand the necessity for doing this and that some method can be worked out promptly for a restart of the job.

Very truly yours,

FRICK COMPANY
W. F. SHRIVER
Chief Engineer

WFS:MRD

cc—HFBurpee, EWForth,
GFrank, TMGlen,
WAHans, JTSanders

EXHIBIT 7

Letter, Jan. 24, 1967, Frick Company to
The Overmyer Company, Inc.

January 24, 1967

Mr. Frank Lake, Treasurer
The Overmyer Company, Inc.
201 E. 42nd Street
New York, N. Y. 10017

Re: Frick Company—Nixon Construction Co.

Contract dated February 11, 1966
Frick Order 230046
Nixon Reference—Job 0427.71

Dear Mr. Lake:

Pursuant to the conversation between Mr. E. W. Forth, President of Frick Company, and Mr. Robinson, President of The Overmyer Co., Inc., I am forwarding herewith a Note to be executed by The Overmyer Company, Inc. It is my understanding that The Overmyer Co., Inc. agrees to pay Frick Company 10% of the present amount ($194,031.00) due Frick Company, namely $19,403.10, and the balance payable at 6½% interest per annum in 12 equal installments of $15,498.23. Accordingly, the Note is drawn

only on the balance of $174,627.90 plus interest of $11,350.81 for a total of $185,978.71, payable in 12 installments of $15,498.23 each.

If the Note is in conformity with your understanding of the agreement reached between Messrs. Robinson and Forth, please have the attached Note executed by the President of The Overmyer Co., Inc., attested to by the Secretary and the corporate seal impressed thereon and return the executed Note to Frick Company, attention the writer, together with The Overmyer Co., Inc. check in the amount of $19,403.10. Upon execution of the Note, kindly insert the date of such execution where indicated at the top of the Note. When Frick Company receives the properly executed Note and down payment check, we shall immediately undertake steps to place the refrigeration system in operative condition.

Very truly yours,

FRICK COMPANY
Arthur Frederick
Counsel

AF:HGC

EXHIBIT 8

Note, The Overmyer Company, Inc., to Frick Company

FOR VALUE RECEIVED, THE OVERMYER COMPANY, INC., a New York Corporation, (herein called "Maker"), with its principal office at 201 East 42nd Street, New York, N.Y., promises to pay to FRICK COMPANY, a Pennsylvania Corporation, (herein called "Payee"), at its office in Waynesboro, Pennsylvania, One Hundred and Seventy-Four Thousand Six Hundred and Twenty-Seven Dollars and Ninety Cents ($174,627.90), with interest at six and one-half percent (6½%) per annum, said principal and interest to be paid in twelve (12) equal successive monthly installments of Fifteen Thousand Four Hundred and Ninety-Eight Dollars and Twenty-Three Cents ($15,498.23), beginning March 1, 1967, and on the same day of each month until paid.

The Maker hereby waives presentment demand, notice and protest of this Note.

On the performance of any of the promises or agreements herein, or on the appointment of a receiver of the Maker or its properties, or the filing of a petition by or against the Maker under the Bankruptcy Act of the United States, or on the nonpayment of any of the indebtedness or liability aforesaid, the entire unpaid balance of the Note shall become due forthwith at the option of Payee, but without demand or notice; or on the insolvency, general assignment, or appointment of a receiver of the company, or its properties, the entire unpaid balance of this Note shall become due forthwith and ipso facto without demand or notice.

It is expressly understood and agreed that this Note shall not operate as or be construed to be a waiver of the mechanics lien heretofore filed by the Payee for work performed by Payee for Nixon Construction Company under a contract dated February 11, 1966; and shall continue in full force as though this Note had not been given. However, it is expressly understood and agreed that the payee will forego enforcement of their lien rights and any other legal remedies so long as there is no default under this Note.

IN WITNESS WHEREOF, the said Maker has caused this Note to be executed by its officers thereunto duly authorized and directed by a resolution of its Board of Directors duly passed and adopted by a majority of said Board at a meeting thereof duly called, noticed and held.

THE OVERMYER COMPANY, INC.
By: Frank J. Lake
Treas.

ATTEST:

E. M. Connery
Secretary

(Corporate Seal)

EXHIBIT 9.

Letter, Feb. 1967, Frank J. Lake to Frick Company.

THE OVERMYER COMPANY, INC.

New York, N. Y. 10017

February 16, 1967

Mr. Arthur Frederick
Counsel
Frick Company
Waynesboro, Pa.

Dear Mr. Frederick:

Enclosed is the Note which you sent us as amended per your conversation with Mr. Connery. Also enclosed is our check for the payment due at this time.

We will very much appreciate your beginning work immediately in that we have an acute time problem at the Toledo warehouse.

Sincerely,

Frank J. Lake

FJL:ram
Encls.

2-17-67

Hand carried this check & note to Bob Lesher this date.
[Initials]

EXHIBIT 10.

Notice of Completion and Acceptance, March 17, 1967.

FRICK COMPANY
NOTICE OF COMPLETION

3/17/67

Nixon Const. Co.—Overmyer Warehouse Co.
Toledo, Ohio

Gentleman:

I have this day completed all work of supervision and or erection and (demonstration) of the machinery and equipment specified in contract with you dated 2/11/66, and respectfully request acceptance of the said machinery and apparatus as per the contract conditions.

Yours truly,

Ira C. Coleman
Erector

Technical Services

3/17/67

Frick Company,
Waynesboro, Pa.

Gentleman:

This is to inform you that your Erector, Mr. Ira C. Coleman has completed in a satisfactory manner all work of supervision and or erection and demonstration specified in contract with you dated 2/11/66, and that the said work as well as the machinery and apparatus specified in said contract, is hereby accepted as per the contract conditions.

Yours truly,

Marion Willis, V. P. Refrigeration
By William W. Byron, Gen. Mgr., Toledo

EXHIBIT 11

THE OVERMYER COMPANY, INC.
201 East 42nd Street - New York, N. Y. 10017 - 212 867-2170

David V. Douthit
Administrative Assistant to the President

March 6, 1968

Arthur Frederick, Esq.
Frick Company
Waynesboro, Pennsylvania

Dear Mr. Frederick:

As of this date the D. H. Overmyer Co., Inc. has incurred expenses in the amount of $7,556.72 to repair the equipment that Frick Company installed in our Toledo cold storage warehouse.

Frick Company is the holder of a note issued by the D. H. Overmyer Co., Inc. in the original amount of $130,977.

I wish to deduct this $7,556.72 from the note payments.

If I do not hear from you by return mail prior to March 31, 1968, I will assume that you agree with me on the above and I will deduct it from the payments on the note.

Cordially,

DAVID V. DOUTHIT
David V. Douthit

cr
Registered Mail

EXHIBIT 12

FRICK COMPANY
Waynesboro, Pa. 17268

March 8, 1968

717 762-2121
CABLE: FRICK

Mr. David V. Douthit,
Administrative Assistant to the President
The Overmyer Company, Inc.
201 East 42nd Street
New York, N. Y. 10017

Dear Mr. Douthit:

Reference is made to your letter of March 6, 1968 wherein you assert a claim against Frick Company in the amount of $7,556.72 for alleged repair of equipment installed by Company at your Toledo cold storage warehouse.

First and foremost, the Frick Company will not agree to the deduction of this alleged $7,556.72 from the payments due under the original note in the amount of $130,977.00.

Since you have made no attempt to substantiate the claimed expenditures, it is difficult for us to determine the existence of Frick's liability. This amount probably includes expenditures incurred in rewinding motors, the liability for which was denied by Frick Company in a letter dated December 1, 1967 and sent to Mr. Daniel Fitzgerald. In addition, Frick Company has requested payment of $5,725.94 for extras incurred by Frick in connection with the Toledo cold storage warehouse installation. A full discussion of this claim for extras was set forth by the writer in a letter to Mr. Robinson dated February 12, 1968.

In view of the foregoing, it is quite obvious that Frick Company cannot agree to your proposal. Any default in payment of the instalment note will result in appropriate legal action for collection.

Cordially,

Frick Company
ARTHUR FREDERICK
Arthur Frederick
Counsel

AF:HGC

CC R. W. Robinson, President
Certified Mail

Blind copies—P. F. ErkenBrack
R. R. Lesher
N. P. Whitney

Refrigeration & Air Conditioning - Forest & Farm Machinery

EXHIBIT 12A

101 Park Avenue

New York, N. Y. 10017

Telephone MU 5-0511

June 13, 1966

D. H. Overmyer
Nixon Construction Co.
201 East 42nd Street
New York 10017, N. Y.
Subject: Refrigeration-Toledo
Frick #230046

Att: Mr. David E. Clarke

Gentlemen:

The Frick Company has again suggested that I call your attention to the fact that Toledo Edison is on record with a statement that they will furnish 480 volts.

The motor manufacturer has taken the position that the 440 volt motors will not be covered by a one year warranty if 480 volts are supplied.

This point is covered in Article 1—page 10 of the contract,

> "The Seller warrants machinery and equipment manufactured by others only to the extent that the Seller can enforce liability against the manufacturer thereof."

Please accept my apology for being repititious, but I assure you I will not mention the matter again.

Very truly yours,

FRICK COMPANY
HOWARD F. BURPEE

HFB:bl

Refrigeration & Air Conditioning-Forest & Farm Machinery

EXHIBIT 13.

Letter, June 23, 1967, D. H. Overmyer Co., Inc., to Frick Company.

D. H. OVERMYER CO., INC.

N. Y., N. Y. 10017

June 23, 1967

Arthur Frederick, Esq.
Counsel
Frick Company
Waynesboro, Pennsylvania 17269

Dear Mr. Frederick:

I have been informed that a settlement of your client's claim against our company has been negotiated between Mr. Forth, President of Frick Company and Mr. Robinson, President of D. H. Overmyer Co., Inc.

I am enclosing an Installment Note in the principal amount of $130,970.94. This Note will be amortized over 21 months with the First Installment on June 1, 1967. It has been executed by our Ohio parent corporation, the Ohio state corporation, D. H. Overmyer and Shirley C. Overmyer.

We shall execute and record second mortgages on a Tampa and a Louisville site in order to secure this Note.

I have instructed our local attorneys in both cities to prepare second mortgage instruments and to order a title binder.

EXHIBIT 14.

Letter, Oct. 2, 1967, The Overmyer Company, Inc., to the Frick Company.

THE OVERMYER COMPANY, INC.

New York, N.Y. 10017

October 2, 1967

Arthur Frederick, Esq.
Frick Company
Waynesboro, Pennsylvania

Re: *Installment Note*

Dear Mr. Frederick:

In Mr. Cassidy's absence, I am forwarding to you the executed original of our Installment Note dated June 1, 1967, in the amount of $130,977.00 together with five checks in satisfaction of the preliminary obligation thereunder to Frick Company as follows:

Date	*Check No.*	*Amount*
8/31/67	3103	$6,891.85
8/31/67	3104	6,891.85
8/31/67	3105	6,891.85
8/31/67	3106	6,891.85
10/1/67	3235	6,891.85

I am advising our local attorneys in Tampa and Louisville by copy of this letter to record the second mortgages previously agreed upon between you and Mr. Cassidy and which they now have in their possession.

I would ask that you have your corresponding attorney in Toledo to proceed to discharge the three Affidavits of Lien filed against our Toledo Cold Storage Facility.

I trust all the above is in accordance with the arrangements made between yourself and Mr. Cassidy on behalf

of this company. Please advise if there is anything further I can do.

Your very truly,

Edmund M. Connery
Secretary & General Counsel

EMC:ti
cc: Thomas W. Bullitt, Esq.
Edward Kohrs, Esq.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Paul C. Guth

(Filed: August 15, 1968)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

PAUL C. GUTH, being duly sworn, deposes and says that:

(1) I am a member of the firm of Lauterstein & Lauterstein, 30 East 42nd Street, New York, New York, attorneys for the plaintiff Frick Company herein.

(2) At the request of Shumaker, Loop & Kendrick, attorneys for the plaintiff herein, I obtained a certified copy of the complaint of defendant D. H. Overmyer Co., Inc., an Ohio corporation in an action which was instituted by said Ohio corporation against our client Frick Company in the United States District Court for the Southern District of New York. Such action bears number 68 Civ. 2262 and is more fully described in paragraph (5) of my earlier affidavit verified July 29, 1968 heretofore filed or to be filed herein.

(3) I obtained such certified copy so sent to Ohio counsel by instructing the managing clerk of our office to pro-

ceed to the United States District Court for the Southern District of New York and obtain the appropriate certification on a copy of the complaint.

(4) Subsequently, the managing clerk of our office handed me such certified copy which was then forwarded by me to Ohio counsel.

(5) At the time I received such certified copy from the managing clerk, he advised me that the certification had been done by an official in the office of the Clerk of the Court after arrangements had been made to obtain the original complaint filed in the Court from the office of Judge Mansfield, a Judge of said Court where the entire file of said case is presently held in connection with his disposition of the motion more fully described in my earlier affidavit.

(6) Such certification is made in the name of John J. Olear as Clerk of the United States District Court for the Southern District of New York by one of his deputies.

(7) Said John J. Olear is listed as "Clerk of Court" in the section "United States District Court Southern District" in the official directory of the City of New York for the year 1967. I have also seen the name of John J. Olear listed as Clerk of the Court on various directories in the United States Court House, Foley Square, New York. Accordingly, I believe said John J. Olear to be the Clerk of the United States District Court for the Southern District of New York.

Paul C. Guth

Sworn to before me this 6th day of August, 1968.

Mary P. Dillon
Notary Public, State of New York
No. 44-6035100
Qualified in Rockland County
Certificate filed with N.Y. Co. Clerk
Commission Expires March 30, 1970

Exhibit to Paul C. Guth Affidavit

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Complaint

• • • • • • • • • • •

Plaintiffs, Nixon Construction Co., Inc., and D. H. Overmyer Co., Inc., by their attorney, complaining of the defendant, Frick Company, show this court and allege, on information and belief:

AS AND FOR A FIRST COUNT

1. Plaintiff, Nixon Construction Co., Inc., is a corporation, incorporated under the laws of the State of Florida, is licensed to conduct and transact business in the State of New York, and maintains its office and principal place for the transaction of its business in the County of New York, State of New York.

2. Plaintiff, D. H. Overmyer Co., Inc., is a corporation, incorporated under the laws of the State of Ohio, is licensed to conduct and transact business in the State of New York, and maintains its office and principal place for the transaction of its business in the County of New York, State of New York.

3. Defendant is a corporation, incorporated under the laws of the State of Pennsylvania and maintains its office and principal place for the transaction of its business in the State of Pennsylvania.

4. The amount in controversy in this cause exceeds the sum of ten thousand ($10,000.) dollars, exclusive of interest and costs.

5. Plaintiff, D. H. Overmyer Co., Inc. was, at all times hereinafter mentioned, the owner of premises located at 3630 South Street, Toledo, Ohio, hereinafter designated as Toledo Site #3.

6. Plaintiff, Nixon Construction Co., Inc., was, at all times hereinafter mentioned, the General Contractor engaged by plaintiff, D. H. Overmyer Co., Inc., to construct a cold storage warehouse on plaintiff's premises designated in paragraph #5 hereof as Toledo Site #3.

7. On or about the 11th day of February, 1966, plaintiff, Nixon Construction Co., Inc., and defendant, entered into a contract No. 6306 at the principal office of plaintiff in the City of New York, State of New York, whereby defendant was engaged to perform certain work, labor, services and to furnish materials, equipment and machinery necessary for the construction of a complete automatic refrigeration system to be installed at the premises designated herein as Toledo Site #3. Copy of the aforesaid contract is annexed hereto, made a part hereof, and marked Exhibit A.

8. Plaintiffs have duly performed all the conditions of such contract on their part.

9. Defendant breached the aforesaid contract in that it performed its services in such an incompetent, negligent and unworkmanlike manner, and in that it supplied materials and machinery of such poor design and quality that plaintiffs were required and compelled to engage, and did in fact engage, other contractors to repair the defects existing therein, which defects existed solely because of the negligent work, design, and defective materials supplied, by defendant, as aforesaid.

10. By reason of the foregoing facts, plaintiffs have been damaged in the sum of Twenty-six Thousand Eight Hundred ($26,800.00) Dollars.

AS AND FOR A SECOND COUNT

11. The allegations contained in paragraphs 1 through 9 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

12. The equipment and materials designed, fabricated and supplied by defendant, as aforesaid, were to have con-

stituted a completely autonomous and automatic refrigeration system.

13. Because of defendant's incompetent, negligent, and unsatisfactory design and workmanship, and because defendant designed, fabricated and/or supplied equipment & materials unsuitable and inadequate to meet the demands of the system; and because of defendant's general breach of the contract, as aforesaid, the system, as aforesaid, or integral and essential parts thereof, repeatedly broke down and became inoperative.

14. Due to the facts as aforementioned in paragraph 13 hereof, plaintiff was compelled and required to, and did in fact, hire, engage and employ additional qualified personnel to tend, maintain, and control the system at all times.

15. By reason of the foregoing facts, plaintiff has been damaged in the sum of Nine Thousand ($9,000.00) Dollars.

AS AND FOR A THIRD COUNT

16. The allegations contained in paragraphs 1 through 9 and paragraphs 11 through 14 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

17. In and by the aforesaid agreement, a copy of which is annexed hereto, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said agreement and a part of the consideration for which defendant was paid the price set forth therein.

18. The defendant entered upon the performance of the work under the said agreement, and had wholly and totally failed and neglected to complete the said work in the time specified in the said contract for the completion thereof.

19. By reason of defendant's failure to complete the said work within the time specified in the said contract,

plaintiff was unable to have the same completed so as to go into possession thereof, and to have the same occupied as a public cold storage warehouse.

20. By reason of the foregoing facts, plaintiff has been damaged in the sum of Fifty Thousand, Five Hundred ($50,500.00) Dollars.

AS AND FOR A FOURTH COUNT

21. The allegations contained in paragraphs 1 through 9, paragraphs 11 through 14, and paragraphs 16 through 19 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

22. Among other things, the defendant guaranteed and warranted that, for a period as set forth in said contract, the machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10 degrees F. to within the limits of standard temperature controls.

23. The said refrigeration system installed by defendant was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

24. Within the period set forth in the contract annexed hereto, and upon ascertaining that the said equipment was defective and inadequate, plaintiff demanded of defendant that he make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and the said defendant wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

25. Upon the failure, neglect and refusal of the defendant to complete the aforesaid contract and warranty, plaintiff was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

26. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while plaintiffs were ignorant of such facts, they paid to the defendant the sum of Two Hundred Twenty-three Thousand and Six ($223,006.) Dollars, the total amount which they were required to pay to the defendant under the aforesaid contract, in the form of cash and installment note.

27. By reason of the foregoing facts, plaintiff has been damaged in the sum of Eighty-six Thousand, Three Hundred ($86,300.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant:

(1) On the First Count in the sum of Twenty-six Thousand, Eight Hundred ($26,800.00) Dollars, together with interest from the 1st day of March, 1967;

(2) On the Second Count in the sum of Nine Thousand ($9,000.00) Dollars, together with interest from the 1st day of March, 1967;

(3) On the Third Count in the sum of Fifty Thousand, Five Hundred ($50,500.00) Dollars, together with interest from the 1st day of March, 1967;

(4) On the Fourth Count in the sum of Eighty-six Thousand, Three Hundred ($86,300.00) Dollars, together with interest from the 1st day of March, 1967;

(5) For costs and disbursements of this action.

JOHN P. GARRIGAN
John P. Garrigan
Attorney for Plaintiff
Office and P.O. Address
201 East 42nd Street
Suite 400
New York, New York 10017

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Paul C. Guth

(Filed: August 15, 1968)

• • • • • • • • • • •

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL C. GUTH, being duly sworn, deposes and says that:

(1) I am a member of the firm of Lauterstein & Lauterstein, New York attorneys for the plaintiff Frick herein. By reason of the premises, I am familiar with the matters hereinafter set forth. This affidavit is submitted in opposition to a motion in this Court to stay the execution of a certain judgment obtained by plaintiff Frick Company (hereinafter "Frick") against one of the defendants herein and for a new trial in the instant action.

(2) I am informed and believe that this action was commenced on July 12, 1968 for judgment in the amount of $62,370., together with appropriate interest and costs by reason of the default of defendant to pay the remaining balance on a note (hereinafter the "Note") in the original amount of $130,977. Such note, among other things, authorized any attorney designated by Frick to appear in an Ohio Court, waive issuance and service of process and confess judgment in the event that the makers of such note made default in payment of any installment thereof required thereunder and such default remained uncured for a period of 15 days. On the basis of the pleadings herein, I am informed and believe judgment was rendered by this Court in favor of Frick and against defendants for the sum of $62,370 with interest and costs on July 12, 1968. Such judgment was entered and docketed the same day.

(3) The instant motions are directed against the execution of such judgment and for a new trial.

(4) Such motions are supported by an affidavit by Joseph W. Westmeyer, Jr., Esq., verified July 22, 1968. In such affidavit Mr. Westmeyer concedes that the judgment herein was entered by virtue of a warrant of attorney; that the Note upon which such judgment was entered represented the contract price for the installation of a refrigeration system in a warehouse building in Toledo, Ohio owned by D. H. Overmyer Co., Inc. (hereinafter "Overmyer") one of the defendants herein; and alleges "that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment was breached;"

Mr. Westmeyer's affidavit does not contain any factual details or incorporate any correspondence or other papers to which this Court could refer in assessing the likelihood of Overmyer's success if a motion for a new trial was granted; nor does Mr. Westmeyer set forth any facts indicating financial irresponsibility on the part of Frick which would prevent the recovery of any amounts to which Overmyer might ultimately be adjudged to be entitled against Frick in this or any other action. It is also to be noted that Mr. Westmeyer does not express any belief that his client will ultimately succeed but merely swears that his client will "present evidence".

(5) The claims set forth in such barebone fashion in Mr. Westmeyer's affidavit are already the subject of an action which was brought among others by Overmyer as plaintiff against Frick in the United States District Court for the Southern District of New York. Such action bears number 68 Civ. 2262. Service of summons and complaint therein was made upon Frick on June 14, 1968. Such complaint contains three causes of action which are based on wrongdoings by Frick substantially characterized by the portions of Mr. Westmeyer's affidavit hereinabove set

forth with demands for damages aggregating $132,100. My firm is acting as attorneys for Frick in the aforementioned action in the United States District Court for the Southern District of New York.

(6) After the commencement of such action in the United States District Court of New York (hereinafter the "New York action"), Overmyer brought a motion to enjoin Frick from enforcing the Note during the pendency of the New York action. Such motion was brought on by an order to show cause signed by the Hon. Marvin E. Frankel, a Judge of the United States District Court. The order to show cause contained a temporary stay of all proceedings by Frick to enforce the Note pending a decision of the motion for a temporary injunction.

The order to show cause was based on an affidavit by John P. Garrigan, Esq., sworn to June 19, 1968 which is attached hereto and made a part hereof as Exhibit A and a memorandum attached hereto and made a part hereof as Exhibit B.

(7) On the return date of the order to show cause June 24, 1968, Frick served a factual affidavit in opposition to the motion together with a brief setting forth the points on which it relied in such opposition. Overmyer answered the calendar call "Ready" without submitting any further papers in support of its motion. Subsequent to the calendar call the motion was adjourned first to July 2, 1968 and subsequently to July 16, July 23, 1968 and July 24, 1968 when Overmyer's motion was finally argued before the Hon. Walter E. Mansfield a United States District Court Judge. It is to be noted that Overmyer still submitted the case to Judge Mansfield on the basis of the papers which it had submitted in support of the order to show cause.

(8) Examination of Mr. Garrigan's affidavit (Exhibit A) will indicate that the only reference to the merit of Over-

myer's claim against Frick is contained in paragraph Sixth thereof, which states as follows:

> "The Complaint of the Plaintiffs alleged in substance that the Defendant breached a contract by negligently performing work upon premises of the Plaintiffs and that as a result thereof the Plaintiffs have sustained those injuries and damages as alleged in the Complaint in the total sum of $172,600."

(9) Examination of the complaint will indicate that it contains the most general allegations as to Frick's wrongdoings on which Overmyer's claims are based permitted by "notice pleading" under the Federal Rules of Civil Procedure. Even those allegations are made on "information and belief." Paragraphs Ninth and Tenth of the complaint with respect to the wrongs done by Frick and the damages sustained by Overmyer fairly represent the substance of all the allegations as to wrongdoings and damages contained in the other causes of action. Such paragraphs read as follows:

> "9. Defendant breached the aforesaid contract in that it performed its services in such an incompetent negligent and unworkmanlike manner, and in that it supplied materials and machinery of such poor design and quality that the plaintiffs were required and compelled to engage, and did in fact engage, other contractors to repair the defects existing therein, which defects existed solely because of the negligent work, design, and defective materials supplied, by defendant, as aforesaid."
>
> "10. By reason of the foregoing facts, plaintiffs have been damaged in the sum of Twenty-six Thousand Eight Hundred ($26,800.00) Dollars."

(10) Immediately after the adjournment of the motion for a temporary injunction on July 2, 1968, I made application to Judge Frankel for a vacatur of his stay pending the decision of the motion for a temporary injunction.

Judge Frankel heard Frick's application in Chambers on July 5, 1968 in the presence of Mr. Garrigan, Overmyer's counsel. At the outset of the hearing Judge Frankel stated that the file before him was obviously incomplete since he did not see any of Overmyer's papers on which it based its motion for a temporary injunction.

Mr. Garrigan then referred to Exhibits A and B which Judge Frankel held in his hand at the time.

Judge Frankel expressed some astonishment that Mr. Garrigan was willing to rely on such papers in a motion for a temporary injunction. Judge Frankel then stated that the Overmyer papers did not contain any factual basis on which relief could be granted and that the Frick papers showed Overmyers claims to be without merit. The Judge then vacated the stay. The Frick papers referred to by Judge Frankel substantially embodied the materials incorporated in the affidavit of Howard F. Burpee submitted simultaneously herewith.

In further discussion with Mr. Garrigan, Judge Frankel also stated that he felt that in view of the fact that he had initiated this motion by his order to show cause and had carefully studied all the documents, it would be in the interest of economy of time for him to deny the motion for a temporary injunction since it would obviously fail.

Mr. Garrigan objected to such denial on the ground that another judge of the United States District Court who was presiding over the motion term on July 16 (the date to which the motion had been adjourned) had jurisdiction over the motion and that Judge Frankel had no such jurisdiction.

Judge Frankel did not press this point. However, he did observe that the motion would be moot in any event by the time it was heard since Frick would have entered its judgment in Ohio by then. Judge Frankel then struck the provisions for the temporary stay from the original order to show cause and also signed an order vacating it, a copy of which is annexed to this affidavit as Exhibit C.

(11) I have prepared or read all the papers submitted by our firm on behalf of Frick in this matter, and I can state unequivocally that all of our affidavits and briefs have stressed and emphasized the absence of any factual support for Overmyer's claim and it is to be contradicted by the papers annexed to the Burpee affidavit filed herein.

(12) Overmyer was served with our first papers on June 24, 1968 and the last such paper was served on Overmyer on July 3, 1968.

(13) Despite the above contentions of Frick so often reiterated in their de facto judicial endorsement by Judge Frankel, Overmyer chose to submit its case before Judge Mansfield on July 24 on the same unsupported and general allegations of Frick's wrongdoings. I submit that this tenacity can only be the result of necessity, i.e., the inability of Overmyer's learned and skillful attorneys to dredge up from Overmyer's file any evidence of wrongdoings by Frick which would enable them to make their claim more specific.

(14) The facts and documents set forth or incorporated in the Burpee affidavit as well as the history of the motion of the New York action recited above clearly demonstrate that the instant motions are only a last ditch attempt by Overmyer to avoid the payment of its lawful debts.

/s/ PAUL C. GUTH
Paul C. Guth

Sworn to before me this
29 day of July, 1968.

MARY P. DILLON
No. 44-635120
Notary Public, State of New York
Qualified in Rockland County
Certificate filed with N. Y. Co. Clerk
Commission Expires March 30, 1970

Exhibit to Affidavit of Paul C. Guth

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Affidavit of John P. Garrigan

* * * * * * * * * *

STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN P. GARRIGAN, being duly sworn deposes and says:

THAT he is the Attorney for the Plaintiffs in the above entitled action and is fully familiar with all the facts and circumstances herein.

1. This Affidavit is submitted in support of an application by the Plaintiffs for an order staying all proceedings on the part of the Defendant pursuant to an Installment Note, Indenture and Second Mortgage, each of which is dated June 1, 1967. Copies of the Note, Indenture and Second Mortgage are annexed hereto and made a part of this application.

2. The instruments in question were executed to secure an indebtedness of D. H. Overmyer Co., Inc., to the Defendant, Frick Company, in the sum of $130,977. The mortgaged property was and is located in Jefferson County, Kentucky, and the deed thereto is duly recorded in the Office of the Clerk of the County Court, Jefferson County, Kentucky, in Book 4006, Page 573.

3. The mortgage provides in part as follows:

> "In the event Borrower shall (a) fail to pay the Note and/or interest when the same shall become due and payable; or (b) sell or permit the MORTGAGED PROPERTY to be sold without the assent of LENDERS; or (c) be adjudged a bankrupt or insolvent, make an assignment for the benefit of its creditors or be placed in receivership; or (d) in any manner fail to keep and perform any of the covenants, stipulations, and agreements set

out in the Note or herein contained on its part to be performed, then, and in any of such events, Frick Company may, without notice, at its option immediately declare the entire unpaid balance of the Note and any other indebtedness secured hereby immediately due and payable and proceed to enforce the collection of the same and all charges and costs permitted by law and the lien of this Mortgage."

4. The Installment Note provides in part as follows:

"The undersigned hereby waive presentment, demand, notice and protest of this note".

"The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or of its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default continues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days".

5. By Summons and Complaint dated May 29, 1968, and duly filed in the Office of the Clerk of the United States District Court for the Southern District of New York the Plaintiffs commenced an action to recover for breach of contract by the Defendant.

6. The Complaint of the Plaintiffs alleged in substance that the Defendant breached a contract by negligently performing work upon premises of the Plaintiffs and that as a result thereof the Plaintiffs have sustained those injuries and damages as alleged in the Complaint in the total sum of $172,600. Service was effected upon the Defendant but to date no answer has been interposed.

7. Due to the outstanding obligation by the Defendant to the Plaintiffs said Plaintiff, D. H. Overmyer Co., Inc., has stopped payment to the Defendant of those obligations under the Installment Note, Indenture and Second Mortgage referred to above. Payment has been stopped as of June 1, 1968.

8. Plaintiff is moving for Order to Show Cause instead of normal motion because it is readily apparent that the Plaintiff D. H. Overmyer Co., Inc., would be severely damaged if the Defendant were to accelerate the Note and foreclose upon the premises covered by said mortgage.

9. In view of the foregoing, it is respectfully submitted that the interest of justice will best be served by the granting of the relief sought herein and staying all proceedings on the part of the Defendant until a determination of the action presently pending in this Court.

10. No previous application for the same or similar relief has been made to any other Court or Judge.

WHEREFORE, this deponent respectfully prays that an order be made herein staying all proceedings on the part of the Defendant pursuant to the Installment Note, Indenture and Second Mortgage until a determination of the litigation now pending in this Court together with such other further relief as to this Court may seem just and proper.

/s/ JOHN P. GARRIGAN
John P. Garrigan

Sworn to before me this
19th day of June, 1968.

/s/ GERALD N. GOLDBERG
Gerald N. Goldberg
Notary Public, State of New York
No. 31-6538920
Qualified in New York County
Commission Expires March 30, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Memorandum of Plaintiffs, Nixon Construction Co., Inc., and D. H. Overmyer Co., Inc.

Facts

The Plaintiffs herein are seeking an Order to Show Cause staying any and all proceedings on the part of Defendant Frick Company until a determination of the action which was commenced in this Court by the filing of a Summons and Complaint on May 29, 1968.

Point I

A Stay of Proceedings Is Warranted in This Action

It is necessary for the Plaintiffs to seek extraordinary relief by way of an Order to Show Cause to prevent the acceleration of an obligation executed on June 1, 1967.

On said date an Installment Note in the sum of $130,970. was executed by D. H. Overmyer Co., Inc., and secured by a Second Mortgage on certain property of said Plaintiff D. H. Overmyer Co., Inc.

The action which has been commenced in the U. S. District Court for the Southern District of New York sounds in breach of contract and the Plaintiffs are seeking to recover of the Defendant the sum of $172,600.

The Plaintiff, D. H. Overmyer Co., Inc. has stopped payment to Defendant, Frick Company, pursuant to the Installment Note referred to above in view of the pending litigation in this Court and the substantial nature of the damages sought. Payment has been stopped as of June 1, 1968.

As is indicated in the Affidavit of John P. Garrigan, the Plaintiff, D. H. Overmyer Co., Inc. has stopped payment because of the present litigation and the breach by Defendant, Frick Company, of its contractual obligations with the Plaintiffs.

In view of the fact that the Plaintiff, D. H. Overmyer Co., Inc. would be severely and substantially damaged if Frick Company were to accelerate the Installment Note referred to herein this application for a stay of proceedings is being made.

Point II

The Relief Sought Should Be Granted.

Respectfully submitted,

/s/ John P. Garrigan
John P. Garrigan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Order Vacating Stay

Upon the annexed affidavit and application of Paul C. Guth, verified the 3rd day of July 1968, the Order to Show Cause herein issued on June 19, 1968 and the annexed affidavit and motion of John P. Garrigan in support thereof verified the 19th day of June 1968, the affidavit of Howard F. Burpee verified the 24th day of June 1968, the summons and complaint dated May 29, 1968, the Installment Note dated June 1, 1967, the Indenture dated June 1, 1967, and

the Second Mortgage dated June 1, 1967, and upon all the pleadings and proceedings heretofore had herein, it is

ORDERED, that the third paragraph of said Order to Show Cause herein dated June 19, 1968 is hereby rescinded and revoked and the stay therein ordered of the proceedings more fully described therein on the part of said defendant or its attorney until a hearing and determination of this motion be and hereby is vacated; and

LET service of a copy of this order upon John P. Garrigan, Esq., attorney for plaintiffs herein be good and sufficient notice of entry thereof.

/s/ MARVIN E. FRANKEL
United States District Judge

Dated: July 5, 1968
New York, New York

Index From Defendants' (Overmyer) Memorandum in Support of Motion To Vacate

Filed in the Common Pleas Court of Lucas County, Ohio

* * * * * * * * * *

INDEX

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

C.P. No. 204697

Journal Entry
(Excerpt)

* * * * * * * * * *

This day this cause came on to be heard and was heard on the oral motion of both the plaintiff and defendants for the court to order nunc pro tunc the Clerk of Courts to stamp as filed the 5th day of September, 1968 * * * a certified copy of an opinion by United States District Judge Walter Mansfield [in the case *Nixon Construction Company, Inc. and D. H. Overmyer Co., Inc.* v. *Frick Co.*, File No. 68 Civ. 2262 in the United States District Court, Southern District of New York] * * * all of which were submitted to the Court on that date, considered by the Court in reaching its judgment herein, placed by the Court in the file, but not previously stamped as filed.

The Court, being fully advised in the premises, finds that said motion is well taken.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Clerk of Courts be, and he hereby is, ordered nunc pro tunc to stamp the original affidavits, which are in the Court's file and referred to above, as filed the 5th day of September, 1968.

/s/ JOHN J. CONNORS, JR.
Judge

Approved:

/s/ SHUMAKER, LOOP & KENDRICK
Shumaker, Loop & Kendrick
Attorneys for Plaintiff

/s/ BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants

Certified Copy of an Opinion by United States District Judge Walter Mansfield in the Case of Nixon Construction Co., Inc. and D. H. Overmyer Co., Inc. v. Frick Company

No. 68 Civ. 2262

In the United States District Court
Southern District of New York

(Filed: August 7, 1968)

And Attached to Journal Entry in the
Common Pleas Court of Lucas County, Ohio

C. P. No. 204697

(Filed: March 3, 1969)

APPEARANCES

JOHN P. GARRIGAN, ESQ.
Attorney for Plaintiffs
201 East 42nd Street
New York, N. Y. 10017

LAUTERSTEIN & LAUTERSTEIN
Attorneys for Defendant
30 East 42nd Street
New York, N. Y. 10017

MANSFIELD, D. J.

In this diversity suit for damages which was commenced in June 1968 by two affiliated construction companies ("Nixon" and "Overmyer") against a company engaged in the manufacture and installation of refrigeration equipment ("Frick"), plaintiffs seek an order staying defendant from prosecuting state court proceedings elsewhere to foreclose mortgages given to secure payment of certain installment notes, now admittedly past due, until determination of the present action. For the reasons hereinafter stated the motion is denied. The pertinent facts as re-

vealed in the papers and upon argument of the motion are as follows:

Under a contract dated February 11, 1966 between Nixon and defendant, which was guaranteed by Overmyer, defendant agreed to install refrigeration equipment in certain warehouse facilities in Toledo, Ohio, being constructed by Nixon for Overmyer, its affiliate. As the work progressed defendant encountered delays caused by Nixon. Nixon also failed to make progress payments required under the terms of the contract. As a result, in November 1966, after Nixon's arrears amounted to well over $100,000, defendant filed mechanics liens on the warehouse property under construction in the sum of $194,031. Thereupon Overmyer, in order to induce the defendant to continue with the installation, paid defendant 10% of the amount owed and executed a promissory note agreeing to pay the balance of the amount due in 12 equal installments of $15,498 each, on condition that in the event of default the balance of the unpaid installments would be accelerated and become due immediately. On March 17, 1967, defendant completed the installation of the refrigeration equipment specified in the contract, which was acknowledged in writing by Overmyer's vice-president to have been "completed in a satisfactory manner". Under the terms of the February 11, 1966 contract, acceptance of the installed machinery and equipment constituted a waiver by the buyer of all claims except warranties. Defendant asserts that the work was performed properly and in accordance with the terms of the contract and that any delays in construction were due to Nixon's failure to meet its obligations and the failure of other contractors hired by Nixon to complete work which had the effect of preventing defendant from proceeding more rapidly.

Following defendant's completion of the installation and acceptance of it by the owner, Overmyer obtained from defendant an extension of time within which to pay off its

indebtedness to defendant. A new installment note was executed by Overmyer in the sum of $130,977 dated June 1, 1967, requiring payment in 21 monthly installments, which would be accelerated in the event of default. This note was secured by execution of second mortgages on real estate in Hillsboro County, Florida, and Jefferson County, Kentucky, whereupon on November 3, 1967, defendant released its mechanics liens. Plaintiff Overmyer has defaulted in payment of installments under its note, leading defendant to undertake institution of foreclosure proceedings. Thereupon plaintiffs commenced the present action which seeks damages in the sum of more than $170,000, based upon defendant's alleged breach of its aforementioned contract. The principal claims are that the defendant performed its services in an incompetent, negligent and unworkmanlike manner. No equitable relief is demanded.

Defendant asserts that the instant action and application for a stay is baseless and has been instituted for the purpose of preventing defendant from enforcing the security to which it is entitled under its 1967 agreement with Overmyer.

Conclusions

Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary the extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit.

No basis for equitable relief in the form of a stay or injunction is indicated. Plaintiffs' suit is limited to an action of damages and there is no showing that it would suffer any irreparable injury as a result of defendant's enforcement of the security.

The effect of granting relief would be to prevent the institution of court proceedings in Florida and Kentucky in violation of the policy enunciated in Title 28 U.S.C. § 2283.

Accordingly, plaintiffs' motion for injunctive relief in the form of a stay is denied. The foregoing shall constitute the Court's findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P.

So Ordered.

s/ Walter R. Mansfield
U.S.D.J.

Dated: August 7, 1968.

IN THE
COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697

Motion for Reconsideration

• • • • • • • • • • •

Now come the appellants herein and move the court to reconsider its findings that defendants-appellants failed to prove the existence of a valid defense and that the answer and cross petition of defendants-appellants constituted only a counterclaim, and to reconsider its failure to rule upon the issue of the proper rate of interest to be charged on the judgment as requested by defendants-appellants.

Respectfully submitted,

/s/ Bugbee & Conkle
Bugbee & Conkle
Attorneys for Defendants-Appellants

IN THE
COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697

Motion To Certify the Case to the Supreme Court

* * * * * * * * * * *

Now come the appellants herein and move the court to certify the decision herein to the Supreme Court of Ohio because of its conflict with *Rabb* v. *Kayline Co.*, 4 Oh. L.A. 703 (C.A., Cuyahoga, 1926); *Canton Implement Co.* v. *Rauh*, 37 Oh. App. 544 (Stark, 1930); *Duraclean Co.* v. *Hunter*, 4 Oh. App. 2d 123, 33 Oh. Op. 2d 187 (Medina, 1965) and *McMillen* v. *Willard Garage*, 14 Oh. App. 2d 112 (Hancock, 1968).

Respectfully submitted,

/s/ BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants-Appellants

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697

Application for Conclusions of Fact

* * * * * * * * * * *

Now come the appellants herein and apply to the court to state on the record the conclusions of fact found separately from the conclusions of law in this appeal.

Respectfully submitted,

/s/ BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants-Appellants

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

Journal Entry

* * * * * * * * * * *

This cause came on to be heard on the Application of defendants-appellants for conclusions of fact found separately from conclusions of law; Motion of defendants-appellants for reconsideration; and Motion of defendants-appellants to certify the record of the Court of Appeals to the Ohio Supreme Court as a conflict case; and the same was submitted to this Court on the Briefs of counsel.

The Court, being fully advised in the premises, finds that the Application of defendants-appellants for conclusions of fact found separately from conclusions of law should be denied.

The Court further finds that the Motion of defendants-appellants for reconsideration should be overruled.

The Court further finds that the judgment of this Court is not in conflict with any decision of the Court of Appeals of any other district, accordingly the Motion of defendants-appellants to certify the record of the Court of Appeals in this case to the Ohio Supreme Court should be overruled.

It is therefore ORDERED, ADJUDGED and DECREED that the Application of defendants-appellants for conclusions of fact found separately from conclusions of law is denied.

It is further ORDERED, ADJUDGED and DECREED that the Motion of defendants-appellants for reconsideration is overruled.

It is further ORDERED, ADJUDGED, and DECREED that the Motion of defendants-appellants to certify the record of

the Court of Appeals in this case to the Ohio Supreme Court is overruled.

To all of which defendants-appellants except.

/s/ CLIFFORD F. BROWN
Judge of the Court of Appeals Presiding

Approved:

BUGBEE & CONKLE

/s/ BUGBEE & CONKLE
Attorneys for Defendants- Appellants

SHUMAKER, LOOP & KENDRICK

/s/ JAMES M. TUSCHMAN
Attorneys for Plaintiff-Appellee

THE SUPREME COURT OF THE STATE OF OHIO

1969 Term

To wit: December 17, 1969

No. 69-720

Mandate

* * * * * * * * * * *

To the Honorable Common Pleas Court Within and for the County of Lucas, Ohio, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

69-5

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted]

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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AUTHORITIES CITED

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

Petitioners pray that a writ of certiorari issue to review a judgment of the Ohio Court of Appeals for Lucas County at Toledo, Ohio, dated September 22, 1969, which the Supreme Court of Ohio subsequently refused to review by writ of error on December 17, 1969.

OPINION BELOW

There is no reported opinion by the Court of Appeals. A copy is set forth in the Appendix to this Petition (App. 20a-21a). The Ohio Supreme Court did not write an opinion. Its order dismissing the appeal on December 17, 1969, is here set forth in the Appendix (App. 22a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S. Code, § 1257 (3). Under date of March 19, 1970, Justice Potter Stewart enlarged the time for filing this Application to and including April 16, 1970.

QUESTIONS PRESENTED

(1) May a State Court enter judgment on a promissory note without process or notice to the defendant, and without affording defendant an opportunity to be heard, where the note authorizes the holder to appoint any attorney "to confess judgment" in event of default?

(2) After judgment pro confesso has been entered on such a promissory note without notice to defendant, may the trial court refuse to grant a prompt and meritorious prayer to vacate the judgment and afford defendant a trial on the merits of his substantive defense tendered by sworn answer, showing complete failure of consideration for said note?

(3) Does federal constitutional due process require notice and opportunity for hearing at some point in the judicial proceeding, or may one party force the other in advance to surrender the constitutional right to notice and hearing as part of the consideration for the contract?

STATEMENT OF THE CASE

Petitioners had engaged a contracting firm to build and equip a cold storage warehouse in the City of Toledo, Ohio. Respondent corporation undertook, by sub-contract, to install the refrigeration plant called for by plans and specifications (proposed Answer of petitioners, App. 12a).

Payment of the purchase price, $223,000., was made partly in cash and partly by delivery of a promissory note due in monthly installments signed by petitioner, in the original amount of $130,977 (App. 4a). By a series of payments the balance due on said note was reduced some 50% to $62,370. (App. 4a), when the refrigerating plant suddenly suffered a complete cardiac collapse (App. 13a-18a).

As a result there was a loss of various goods in storage, and the entire cooling system had to be revised and renewed, at very great cost to petitioners. Petitioners notified respondent, and refused to complete the payments scheduled by the note, whereupon respondent corporation, payee and holder of the note, took judgment (App. 8a) in accord with the so-called "cognovit" provision:

> The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this (sic) issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest * * * (App. 6a).

An Ohio attorney, wholly unknown to petitioners, appeared for petitioners, and confessed judgment[1] on July 12, 1968, in favor of respondent for the sum of $62,370, plus interest and costs (App. 7a).

Neither process nor notice was issued to petitioners as to the commencement of suit or the designation of counsel. Said counsel for petitioners did not inquire as to the existence of any possible defense, or matter of reduction, set-off or counterclaim.

The sole and only notice to petitioners was given after the judgment had been entered (App. 9a).

Petitioners immediately moved for a New Trial and to Vacate Judgment, setting forth by affidavit the breakdown of the equipment, the damages and great cost of replacement, and sought to defend the action on the note by showing a failure of consideration (App. 10a-11a). An Answer under oath accompanied the Motion to Vacate, showing a meritorious defense which was well known to respondent at the time it took the judgment (App. 12a-18a).

All these Motions were overruled, and prior orders for execution and discovery were affirmed (App. 19a).

On appeal petitioners specifically claimed a denial of due process by the procedure which denied notice and hearing before and after judgment, and completely by-passed a valid defense (App. 20a). [2d Assignment of error] The Court of Appeals in laconic terms found *"that the trial court,* **with no abuse of discretion,** *properly overruled the defendants-appellants motion to vacate the judgment."* It affirmed and remanded the cause (App. 20a-21a) (emphasis added).

Petitioners appealed to the Supreme Court of Ohio, claiming *inter alia,* a denial of the federal constitu-

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[1] This appears to conform to Ohio law, Rev. Code §2323.13 (App. 22a).

tional right to due process of law in the entry of judgment without notice, and in the refusal to consider for trial a valid defense, promptly tendered by the defendant after receiving notice of the judgment (App. 21a).

The Ohio Supreme Court wrote no opinion, but by printed form "the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein." (App. 22a)

REASONS FOR GRANTING THE WRIT

I. A Money Judgment Rendered Without Service or Notice to the Defendant Denies Fundamental Rights Protected by the Due Process Clause of the Fourteenth Amendment. Even Though Based Upon a So-Called Warrant of Attorney in a Promissory Note. In This the Decision Below Conflicts With Applicable Controlling Decisions of This Court.

Noteworthy is the fact that the Judgment Entry was stamped 4:22 p.m., *one minute* after the suit was filed on the note at 4:21 p.m. No process was issued; nor was any kind of notice given.

Judgment was "confessed" by an attorney who is a complete stranger on this record to both parties. He did not claim to be "designated by the Holder" of the note sued upon; nor did he allege any relationship with the defendants. He merely appeared as Attorney for Defendants "By virtue of the warrant of attorney contained in a certain promissory note . . ."

When petitioners were notified of the judgment, a Motion for New Trial was filed, supported by Affidavit of counsel alleging no notice (App. 10a-11a), and a proposed Answer was filed, showing that there existed between the parties a very serious dispute as to whether or not any part of the demand was really due (App. 12a).

This answer, under oath, alleged a gross failure of consideration for the note in suit. It recited demands

by petitioners for repairs and modifications in the equipment purchased with said note, and alleged that upon respondent's failure to perform its contract obligations, other persons were engaged to repair and service the plant. Thereupon petitioners declined to make further payments to respondent.

When respondent sued on this note and caused the entry of judgment without process or notice to petitioners, it completely denied petitioners all opportunity to put in a meritorious defense. In a very real sense the court has been used as an instrument of injustice, and the entry of judgment under such circumstances represents a fraud on the court and on these petitioners.

It requires no discussion to establish that this warrant of attorney is a prepotent device for securing a judgment, and collecting money, without risking a defense by the maker. *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (1952); 31 Ohio Jur. 2d, *Judgments*, § 139 (1958).

Amply justified is the observation that such practice "is the loosest way of binding a man's property that was ever devised in any civilized country." *Alderman, Bateman & Bateman* v. *Diament*, 7 N.J.L. 197, 198 (1824).

The proceeding under review is clearly in conflict with *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), where this Court, at its last term, held unconstitutional the Wisconsin statute authorizing pre-judgment garnishment without advance notice and hearing. The Court recognized that the debtor may eventually prevail upon a trial. "But in the interim the wage earner is deprived of his employment of earned wages without any opportunity to be heard and to tender

any defense he may have, whether it be fraud or otherwise." (p. 339).

If pre-judgment garnishment is bad for want of notice and hearing, it is inescapable that entry of judgment without such notice and hearing is equally bad, for such judgments generate garnishment, attachment, and liens on property—all pro tanto takings of the kind condemned in the *Sniadach Case*. Counsel for one of the largest finance companies had earlier recognized the identity of impact in telling terms:[1a]

> In Wisconsin where . . . under the small loan law, judgments by confession are prohibited, garnishment procedure may proceed prior to judgment. It is doubtful therefore whether there is any real or practical difference . . . The guy's wages have been garnished without prior notice in either case!

Even where a proper judgment existed against a corporation, this Court prohibited a creditor from seizing property of the owner of unpaid stock without notice and hearing.

> He was "entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." (*Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 423 (1914).

This case is not one in which the defendants (petitioners here) were non-residents beyond the reach of

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[1a] Quoted in *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit.* Hopson, 29 Chi L. Rev. 111, 121 (n.63) (1961), hereinafter cited as Hopson.

process. The second paragraph of the petition on which the judgment in issue was rendered sets forth correctly the address of the resident petitioner in the City of Toledo where the suit was filed (App. 3a).

Why should petitioners have been given no notice that they were being sued? Solely to prevent the raising of a defense which respondent couldn't meet.

In this Court, and at this time, discussion of the pervasive requirements of the due process clause is not required. The concept of fairness, opportunity to defend, substantial justice—these are ingrained constitutional principles, too valuable to be ignored.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), it was said:

> (p. 314) "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> * * *
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted). The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance . . .

On the same ground the Court reversed a judgment based upon notice by publication against a non-resi-

dent, saying, per Holmes, J., "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee,* 243 U.S. 90, 92 (1916).

When a husband in a divorce action was not notified of the entry of alimony charges against him, he "was thus deprived of an opportunity to raise defenses otherwise open to him . . . there was a want of judicial due process . . ." *Griffin* v. *Griffin,* 327 U.S. 220, 228 (1946). The judgment rendered in New York was held to be not entitled to full faith and credit in the District of Columbia. Chief Justice Stone, for the Court, said:

> (p. 231) Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights . . . Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding on the judgment.

II. Relief From an Invalid Judgment, Which Is Conditioned Upon a Demonstration That a Meritorious Defense Exists in the Court's Discretion, Is a Denial of Due Process of Law, and Conflicts With Applicable Decisions of This Court.

In Ohio judgments may be vacated during the term as an exercise of the court's inherent power, upon determining that the defendant has proper grounds, "sufficient in law to constitute a valid defense." *Bellows* v. *Bowlus,* 83 Ohio App. 90, 82 NE 2d 429, 430 (1948). Petitioners followed this procedure exactly (App. 10a-12a), complaining of the lack of notice.

The proposed Answer and Cross Petition (App. 12a) detail the failure of consideration for which the cognovit note was given, and spell out the damages occasioned by the defective equipment and improper installation. It is properly verified (App. 18a).

Without opinion or explanation on this record petitioners' prayers for relief were denied by the trial court, and discovery ordered in aid of prior execution (App. 19a).

On appeal petitioners urged the federal constitutional right, as a matter of due process, to present a defense when the judgment is taken without notice, and where a valid defense is asserted (App. 20a). The Court of Appeals affirmed without discussion, finding **"no abuse of discretion"** below (App. 21a). (emphasis added).

Relying on the Fourteenth Amendment and this Court's decision in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), petitioners asked the Supreme Court of Ohio to review the matter. This was dismissed by that Court *sua sponte* "for the reason that no substantial constitutional question exists herein." (App. 21a-22a).

It seems clear that the averments of the tendered answer for present purposes, should be treated as true. As this Court said in *Covey* v. *Town of Somers,* 351 U.S. 141, 145 (1956), reversing a judgment for improper notice,

> As this stage of the proceedings we are bound, as were the Courts below, to assume that the facts are as disclosed by the uncontroverted affidavits filed with appellant's motion to show cause.

Once notified of the proceedings, a defendant has an absolute right, as an element of a fair hearing, to intro-

duce evidence. *Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917).

This opportunity to present his defense should not be prejudiced by the existence of the unlawful judgment. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), a judgment of adoption was invalidated for want of notice to the natural father. He had learned of the adoption after it was completed, and sought to have it set aside. He was afforded a hearing to prove he had not forfeited the right to object, and he presented witnesses and depositions. The trial court, however, denied his motion to vacate the adoption decree, and confirmed the prior action.

This Court granted certiorari to settle two constitutional questions which seem to control completely the case at bar: (a) the requirement of notice, and (b) the curative effect of the subsequent hearing.

As to the first, it was held (380 U.S. at 550) the want of advance notice "violated the most rudimentary demands of due process of law." The cases are discussed in the terms set forth herein.

As to the subsequent hearing, that was wholly inadequate as a substitute for an orderly hearing in advance of judgment, because it shifted the burden of proof to the petitioner on issues to be proved by his opponent. The Court said (551):

> The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

> (552) A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew.* Only that would have wiped the slate clean. **Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.** His motion should have been granted. (emphasis added)

That decision applies directly to the case under consideration, and points up sharply the denial of federal constitutional rights to notice and a fair hearing.[2]

It is notable that this Court, unlike the Court of Appeals below, did not suggest the right to full hearing in advance of judgment was a matter of "discretion." This Court placed the decision squarely on a basis of constitutional right.

A very sensible and perfectly sound disposition was reached in *Monarch Refrigerating Co.* v. *Farmers' Peanut Co.*, 74 F. 2d 790 (4th Cir. 1935). An Illinois judgment on a cognovit note was to be enforced in North Carolina. The District Court granted full faith and credit. The Court of Appeals, however, noted that the

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[2] *Armstrong* v. *Manzo* was the subject of at least two Law Review studies: 64 Mich. L. Rev. 726 (1966), *Conditioning of Relief from Unenforceable Judgment Upon Showing of Meritorious Defense to Claim Upon Which It Was Entered Can Deny Due Process;* 19 Southwestern L.J. 413 (1965), *Notice and Adoption—The Requirement of Due Process.*

defendant had never been afforded an opportunity to be heard; the cause was remanded for hearing of the defendant's contention that the officer who signed the note in question was without corporate authority for the act. This is essentially the same rule as *Armstrong* v. *Manzo supra*—to wit, there was no notice, therefore no binding judgment. Start over, with actual notice to the other side, and hear the defense.

III. Many Thousands of Judgments Are Taken Every Year on Cognovit Notes Without Process or Notice to the Defendants and Without Opportunity To Present Meritorious Defenses. Thus Forcing Settlement Under Threat of Garnishment of Wages, Seizure of Property, or Damage to Credit Standing. The Matter Is of National Importance and Merits This Court's Review on Certiorari.

In *Sniadach* v. *Family Finance Corp., supra,* this Court recognized the traumatic impact of garnishment without notice, and the gross unfairness produced by the necessity to protect jobs and families from unjustified demands. Identical results flow from judgments without notice, for these inevitably give rise to the very same evils.[3]

Some index of the evil use to which cognovit notes have been put is deduced from the widely varied treatment in the States. 7 States authorize them by statute; while 13 others make them void—including two (Indiana and New Mexico) which make their use a misdemeanor. 23 States have serious restrictions on use of such notes; 29 have small loan laws which pro-

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[3] In Illinois it appears now that before garnishment is permitted under a confessed judgment, there must be a trial de novo after notice to the defendant. Ill. Rev. Stat. Ch. 62, § 82 (1961).

hibit them, and 10 States prohibit their use in retail instalment sales.[4]

A study of the Municipal Court of Chicago shows that out of 193,191 suits filed in 1960, suits on confession of judgment numbered 45,402, or 23.5%. Additional figures for other Cook County courts were estimated at 1,000 per year.[5] It becomes readily apparent that a very large number of judgments are rendered in the manner now before the Court.

Small wonder that Indiana and New Mexico have made such conduct a crime! or that the AFL-CIO labor organizations have advocated the same kind of legislation elsewhere.[6]

In the *Sniadach Case* last term the Court outlawed attachment without notice. It seems clear now that judgment without notice is simply another means of initiating attachment without the requisites of due process; a backdoor to the forbidden garnishment.

The unfairness and invitation to fraud are obvious, not alone as to wage-earners, who are, of course, most often hurt; but also as to small business which could readily be plunged into bankruptcy by a huge judgment—however unjustified. The destruction of ordinary bank credit channels is a fate few businessmen can stand. Then, like the wage-earner who pay to avoid loss of his job, he may try to settle and arrange terms to get rid of the stigma on his credit rating—

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[4] Hopson, *supra*, 29 Chi. L. Rev. 111, 126-129; 35 U. Cincinnatti L. Rev. 470 (1966), *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC*, pp. 490-491.

[5] Hopson, *supra*, p. 119.

[6] See p. 15, *infra*, and note 10.

when he actually may have a valid defense on the merits.[7]

Morality of cognovit notes has engaged the attention of many students and commentators, from the Harvard Law Review statement:[8]

> The waiver of notice provision, however, may render enforcement of the notes unconstitutional.

to Professor Goodrich's unqualified forecast that this Court in a proper case will invalidate cognovit judgments.[9]

In Ohio, where this cause arose, the AFL-CIO council has taken a stand for legislation to make use of a cognovit note a misdemeanor.[10]

Broadly based statistical data on this subject appears to be unavailable, but some samples will indicate the scope of the problem. It has been said that 82% of Pennsylvania banks use cognovit notes, and, "In at least a dozen other states they are more or less widely used."[11] In Franklin County, Ohio, during a 6-month period, a total of 3,510 civil cases were filed, including 500 involving cognovit notes[12]; at this rate 1,000 each year in one Ohio county.

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[7] 35 U. Cincinnati L. Rev. 470, at 481 (1966), *A Clash in Ohio: Cognovit Notes and the Business Ethic of the UCC, supra.*

[8] 73 Harv. L. Rev. 909, at 944 (1960), *Developments in the Law —State Court Jurisdiction.*

[9] Goodrich, Conflict of Laws, § 73 (4th ed. 1964).

[10] 35 U. Cincinnati L. Rev. 470 (1966), *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC,* p. 489, n. 136.

[11] 8 Ohio State L. J. 1 (1941), Hunter, *The Warrant of Attorney to Confess Judgment,* p. 2 n. 6: cited herein as Hunter.

[12] Hunter, *supra,* p. 14.

Obviously no wage-earners or small businessmen, and few of any defendants so oppressed, are financially able to carry a case through the courts to this stage. In fact, research has failed to disclose a single case of this precise issue in this Court. Despite the broad impact of the problem, the average defendant doesn't know his rights and can't afford to protect them. With more than 45,000 confessed judgments in a single year in one Chicago court, the national scope of the problem becomes self-evident, and the vitality of the due process clause requires the voice of this Court.

CONCLUSION

This Court should grant certiorari to review the decision of the Ohio Court of Appeals refusing to vacate a judgment entered without notice to petitioner, and sustaining, as a matter of "discretion," denial of petitioners' prayer for leave to prove a valid defense to said note on the merits. The matter is of national importance, affecting wage-earners, small borrowers, installment buyers, in the thousands through the States.

RUSSELL MORTON BROWN
Attorney and Counsellor at Law
508 Federal Bar Building
Washington, D.C. 20006
Telephone: STerling 3-7300

EDMOND M. CONNERY,
General Counsel
D. H. Overmyer Company
201 East 42nd Street
New York, N.Y. 10017

APPENDIX FOR PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT

D. H. Overmyer Co., Inc. v. The Frick Company

Pertinent Docket Entries

C. P. Appearance Docket No. 408

Cause No. 204697

Pg. No.'s 197 A-4 A-12

Attorneys:

Shumaker, Loop & Kendrick—FRICK COMPANY, a corporation, *Plaintiff-Appellee*

Bugbee & Conkle—D. H. OVERMYER CO., INC., a corporation, *Defendants-Appellants*

1968

July 12——Petition, Warrant of Attorney, Military Affidavit, Answer and praecipe filed.

July 12—Judgment as stated above and for costs. Jour. 392-78.

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc. 201 East 42nd Street, New York, New York, 10017. Certified Number 059724. Return receipt requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., a Kentucky Corp. 201 East 42nd Street, New York, New York 10017. Certified # 059723. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation, System, 1036 Union Building, Cleveland, Ohio 44115. Certified # 059725. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation, System, 1700 Kentucky Home Life Bldg., Louisville, Kentucky 40202. Certified # 059726. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Inc., 302 South Byrne Road, Toledo, Ohio 43615. Certified # 059727. Return receipt requested. Postage 50¢

July 22—Motion of defendants for New Trial, filed.

July 22—Motion of defendants to Stay Execution, filed.

July 22—Affidavit, filed.

August 6—Motion of defendant to Vacate Judgment Rendered on Warrant of Attorney, filed.

Aug. 6—Answer of defendants and Cross petition of defendant D. H. Overmyer Co. an Ohio Corporation, filed.

Nov. 26—Motions to Stay Execution is overruled, for a new trial overruled. Demurrer of defendants to plaintiff's cause of action overruled. Jour. 401-154.

Dec. 4—Notice of Appeal and Praecipe filed. CA 6552

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

FRICK COMPANY, a corporation, 231 West Main Street, Waynesboro, Pennsylvania 17268, *Plaintiff*,

v.

D. H. OVERMYER CO., INC., a corporation, 302 South Byrne Road, Toledo, Ohio 43615,

and

D. H. OVERMYER CO., INC., a corporation, 1700 Kentucky Home Life Building, Louisville, Kentucky 40202,

Defendants.

Petition

1. Plaintiff is a Pennsylvania corporation qualified in accordance with the provisions of Ohio Revised Code Chapter 1703 to do business in Ohio.

2. D. H. Overmyer Co., Inc., Toledo, is an Ohio corporation which resides in and does business in Lucas County, Ohio. To the best of plaintiff's knowledge and to the best of its attorneys' knowledge, the last known Lucas County address of said defendant was and is 302 South Byrne Road, Toledo, Ohio 43615. Said defendant's statutory agent is C. T. Corporation System, 1036 Union Commerce Building, Cleveland, Ohio 44115.

3. D. H. Overmyer Co., Inc., Louisville, is a Kentucky corporation. To the best of plaintiff's knowledge and to the best of its attorney's knowledge, the last known address of said defendant's principal office was and is 201 East 42 Street, New York, New York 10017. Said defendant's statutory agent is C. T. Corporation System, Kentucky Home Life Building, Louisville, Kentucky 40202.

4. On June 1, 1967, defendants, acting through duly authorized officers, executed and delivered to plaintiff a promissory note containing a warrant of attorney (here-

after the said promissory note is called the "Note") pursuant to which the defendants jointly and severally promised to pay to the order of plaintiff in twenty-one (21) equal monthly installments the principal sum of One Hundred Thirty Thousand Nine Hundred Seventy-seven Dollars ($130,977.00) plus interest thereon at the rate of 6% per year on an add-on basis, said interest to commence on June 1, 1967. A true copy of the Note is attached hereto, is designated Exhibit A, and is made a part of this Petition.

5. On May 1, 1968, defendants failed to pay to plaintiff the monthly installment payment required by the Note, and said failure to pay the monthly installment payments required by the Note has continued to this date.

6. By reason of defendants' failure as described in the immediately preceding paragraph, plaintiff, acting in accordance with the terms of the Note, hereby elects to and does hereby declare the entire remaining unpaid principal of the Note, namely, Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00), together with all interest thereon, immediately due and payable, presentment, demand, notice and protest having been duly waived by the defendants.

WHEREFORE, plaintiff prays for judgment against the defendants for the sum of Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00) with interest thereon at the rate set forth in the Note from the 1st day of May, 1968, until the Note is paid in full, and for costs of suit.

SHUMAKER, LOOP & KENDRICK

By /s/ ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.
Attorneys for Plaintiff
Suite 500—811 Madison Avenue
Toledo, Ohio 43624
Phone 241-4201

STATE OF OHIO
COUNTY OF LUCAS } ss:

Robert A. Jefferies, Jr., being duly sworn, says that he is the duly authorized attorney for said plaintiff; that the foregoing petition is founded upon an instrument in writing for the payment of money; that said instrument in writing is in his possession; and that he verily believes the statements contained in the foregoing instrument are true.

ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.

Sworn to before me by said Robert A. Jefferies, Jr., and by him subscribed in my presence this 12th day of July, 1968.

JOYCE A. KWIATKOWSKI
Notary Public

Joyce A. Kwiatkowski
Notary Public, Lucas County, Ohio
My Commission Expires 11-14-71

Exhibit A

INSTALLMENT NOTE

Amount: $130,977.00

New York, New York
June 1, 1967

For value received, the undersigned, jointly and severally, promise to pay to the order of Frick Company, a Pennsylvania corporation, at its office in Waynesboro, Pennsylvania, 17268, the sum of One hundred thirty-thousand nine hundred seventy-seven dollars ($130,977.00) in twenty-one (21) equal monthly installments of six thousand eight hundred and ninety-one dollars and eighty-five cents ($6,891.85) which installments include interest at the

rate of six (6) per cent per annum on an add-on basis commencing June 1, 1967.

The first installment shall be payable June 1, 1967, and the remaining installments on the same date of each successive month thereafter, until this Note has been paid in full.

The Makers or any of them may, at their option, make prepayments on the principal amount of this Note without penalty; together with interest accrued to the date thereof. Prepayments shall be applied to the installments of principal due on this Note in the order of maturity.

The undersigned hereby waive presentment, demand, notice and protest of this Note.

The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or if its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default continues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days.

The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for a period of fifteen (15) days.

Payee agrees to remove any Mechanic's Lien or liens filed by the Payee against any property of the undersigned

including three Affidavits of Lien which were filed on behalf of Frick Company in respect to its claim of $194,031.00 and which were recorded by the Recorder of Lucas County, Ohio as follows:

No. 501285, Volume of Lien Records 46, Page 468,
No. 501831, Volume of Lien Records 46, Page 520, and
No. 502867, Volume of Lien Records 46, Page 542.

D. H. OVERMYER CO., INC.
(a Kentucky corporation)

D. H. OVERMYER
D. H. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive Officer

D. H. OVERMYER CO., INC.
(an Ohio corporation)

SHIRLEY C. OVERMYER
Shirley C. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive Officer

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Appearance of Attorney for Defendants and Confession of Judgment

* * * * * * * * * * *

By virtue of the warrant of attorney contained in a certain promissory note annexed to this Answer and the petition filed herein by plaintiff, I, an attorney at law in the several courts of record of this State, do hereby enter an appearance for the above-named defendants who executed said promissory note and said warrant of attorney and who waive the issuing and service of process therein, and I do hereby confess a judgment in favor of said plaintiff,

against said defendants, on said promissory note for the sum of Sixty-Two Thousand Three Hundred Seventy Dollars ($62,370.00), being the amount appearing due for the principal of said promissory note, plus interest thereon at the rate set forth in said promissory note from May 1, 1968, and also for costs of suit, taxed and to be taxed.

J. RONALL BOWMAN
Attorney for Defendants
402 Lof Bldg.
Toledo, Ohio
Phone No. 243-5227.

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Judgment Entry

This day came Frick Company, plaintiff, by its attorney, Robert A. Jefferies, Jr.; also appeared in open court, for and on behalf of D. H. Overmyer Co., Inc., an Ohio corporation, one defendant herein, and D. H. Overmyer Co., Inc., a Kentucky corporation, the other defendant herein, J. Ronald Bowman, an attorney at law of this court, and by virtue of a warrant of attorney annexed to the promissory note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said promissory note against said defendant herein, J. Ronall Bowman, an attorney ot law of this Three Hundred Seventy Dollars ($62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note, and for costs of suit taxed and to be taxed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

(1) Plaintiff recover from D. H. Overmyer Co., Inc., an Ohio corporation, one of the defendants herein, the follow-

ing sum (hereafter said sum is called the "Judgment Sum"):

> Sixty-two Thousand Three Hundred Seventy Dollars ($62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note (6% add-on interest computed over a 21-month period on a base sum of $130,977.00 or the equivalent of the said 6% add-on interest) together with costs herein expended, taxed and to be taxed; or

(2) Plaintiff recover from D. H. Overmyer Co., Inc., a Kentucky corporation, one of the defendants herein, an amount equal to the Judgment Sum or

(3) Plaintiff recover from each of the defendants such sums which, when totaled, will equal but not exceed the Judgment Sum.

/s/ NICHOLAS J. WALINISKI
Judge

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Notice of Judgment on Cognovit Note

Case No. 204697

To D. H. Overmyer Co., Inc., Defendant:

This is to inform you that a Judgment in the amount of $62,370 plus interest at the rate decreed in the Judgment Entry has been entered against you on a Cognovit Note in the above-captioned case in the Common Pleas Court of Lucas County, Ohio, on July 12, 1968. This notice is sent to you in compliance with Sec. 2323.13 (c) of the Ohio Revised Code.

LUCAS COUNTY COMMON PLEAS COURT
ROBERT KOPF, CLERK OF COURT
By /s/ BEULAH R. LONG
Deputy Clerk

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion for New Trial

* * * * * * * * * * *

Now come the defendants and move the court to vacate the judgment rendered on July 12, 1968, and for a new trial for the following causes which materially affect the substantial rights of defendants, to-wit:

1. Irregularity in the proceedings of the prevailing party and of the court by which defendants were prevented from having a fair trial.

2. The judgment is not sustained by sufficient evidence and is contrary to law.

3. Newly discovered evidence, material for the defendants, which with reasonable diligence they could not have discovered and produced at the trial.

And for other errors manifest from the face of the record.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

CERTIFICATE OF SERVICE

(Omitted)

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Affidavit

* * * * * * * * * * *

Joseph W. Westmeyer, Jr., being duly sworn, says that he is the attorney for the applicants for a new trial herein on the grounds of newly discovered evidence.

Affiant says that the judgment herein was entered by virtue of a warrant of attorney without notice to these defendants; that the consideration for the note upon which judgment was entered was the contract price agreed to be paid for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; and that because defendants had no notice of the entry of the court's judgment herein they could not with reasonable diligence have produced such material evidence prior to the court's entry of judgment.

JOSEPH W. WESTMEYER, JR.
Joseph W. Westmeyer, Jr.

Sworn to before me and subscribed in my presence this 22nd day of July, 1968.

ALLAN J. CONKLE
Notary Public,
Lucas County, Ohio

Allan J. Conkle, Notary Public
State of Ohio—Attorney-at-Law
Unexpiring Commission
O. R. C. Sec. 14703

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion To Vacate Judgment Rendered on Warrant of Attorney

* * * * * * * * * * *

Defendants respectfully move the court to vacate and set aside the judgment entered against them herein on the

12th day of July, 1968 during the present term of court, said judgment having been entered by virtue of a warrant of attorney without notice to these defendants.

Defendants say that they have a good defense to this action and the note on which judgment was rendered, as shown by their answer submitted herewith, which they request leave to file herein.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Answer of Defendants and Cross Petition of Defendant, D. H. Overmyer Co., Inc., an Ohio Corporation

1. For answer to plaintiff's petition, defendants deny each, all and singular the allegations of said petition not hereinafter admitted to be true.

2. Defendant, D. H. Overmyer Co., Inc., an Ohio corporation, hereinafter called "Overmyer", on or prior to February 11, 1966, employed Nixon Construction Co., Inc., as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

3. On or about the 11th day of February, 1966, Nixon Construction Co., Inc., and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part

hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

4. Defendants say that the promissory note referred to in plaintiff's petition was executed as and for a part of the purchase price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) for a complete automatic refrigeration system furnished and installed by plaintiff pursuant to the contract in the cold storage warehouse being constructed for and proposed to be operated by Overmyer.

5. The said refrigeration system was not furnished and installed in accordance with the contract of purchase, in that plaintiff supplied materials, equipment and machinery of poor quality and design and negligently installed the same in an unworkmanlike manner; and Overmyer was required to, and did, engage other contractors to repair defects therein which resulted from the negligent work, design and defective materials.

6. The said refrigeration system was to have been a completely autonomous and automatic refrigeration system, but because plaintiff failed to comply with the contract, and because the said system was negligently installed by plaintiff, the system did not operate automatically. Overmyer was required to, and did, employ personnel to tend, maintain and control the system at all times.

7. The contract provided that said refrigeration system was to have been completed and ready for final acceptance on August 15, 1966, whereas plaintiff did not actually complete the installation unntil March 17, 1967. Overmyer sustained lost profits because it was not able to operate the cold storage warehouse during the seven month period between the date provided for completion of the warehouse in the contract and the actual date of completion.

8. The refrigeration system installed by plaintiff was guaranteed and warranted by it to be free from defects

in material and workmanship and to hold a temperature of minus 10° F. to within the limits of standard temperature controls, but, as installed, the said system was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

9. Because of the facts set forth in paragraphs numbered 5 through 8 above, Overmyer's expenses and losses exceeded the balance which plaintiff claims to be due on the note, and there was a failure of consideration for said note.

CROSS PETITION

First Cause of Action

10. For its cross petition against plaintiff, Overmyer incorporates all of the allegations of the foregoing answer as fully as though repeated herein.

11. Overmyer says that prior to February 11, 1966, it employed Nixon Construction Co., Inc. as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

12. On or about the 11th day of February, 1966, Nixon Construction Co., Inc. and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars ($223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmeyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

13. Overmyer has duly performed all the conditions of the contract on its part.

14. Plaintiff breached the contract in that it performed its services in an incompetent, negligent and unworkmanlike manner, and in that it supplied materials, equipment and machinery of such poor design and quality that the refrigeration system furnished by plaintiff would not operate as represented by plaintiff and Overmyer was required and compelled to engage, and did, in fact, engage, other contractors to repair the defects existing in the refrigeration system; which defects existed solely because of the negligent work, design, and defective materials, equipment and machinery supplied by plaintiff.

15. By reason of the facts set forth in the first cause of action Overmyer has been damaged in the sum of Twenty-six Thousand Eight Hundred Dollars ($26,800.00).

Second Cause of Action

16. For its second cause of action, Overmyer incorporates each, all and singular the allegations contained in its first cause of action and further says that the machinery, equipment and materials designed, fabricated and supplied by plaintiff were to have constituted a completely autonomous and automatic refrigeration system.

17. Because of plaintiff's incompetent, negligent and unsatisfactory design and workmanship, and because plaintiff designed, fabricated and/or supplied machinery, equipment and materials unsuitable and inadequate to meet the demands of the system, and because of plaintiff's breach of the contract, as aforesaid, the automatic refrigeration system, or integral and essential parts thereof, repeatedly broke down and became inoperative and failed to operate automatically and Overmyer was compelled and required to, and did, in fact, hire, engage and employ additional qualified personnel to tend, maintain and control the system at all times.

18. By reason of the facts set forth in the second cause of action Overmyer has been damaged in the sum of Nine Thousand Dollars ($9,000.00).

Third Cause of Action

19. For its third cause of action, Overmyer incorporates each, all and singular the allegations contained in its first and second causes of action and further says that in and by the contract, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said contract, and a part of the consideration for which plaintiff was paid the price set forth therein.

20. Plaintiff entered upon the performance of the work under said contract, but wholly and totally failed and neglected to complete the said work in the time specified in the contract for the completion thereof.

21. By reason of plaintiff's failure to complete the said work within the time specified in the contract, Overmyer was unable to have the construction of the cold storage warehouse completed, to take possession thereof, and to have the same occupied as a public cold storage warehouse, and Overmyer lost the use of such completed warehouse for approximately seven (7) months.

22. By reason of the facts set forth in the third cause of action, Overmyer has been damaged in the sum of Fifty Thousand Five Hundred Dollars ($50,500.00).

Fourth Cause of Action

23. For its fourth cause of action, Overmyer incorporates each, all and singular the allegations contained in its first, second and third causes of action and further says that, among other things, plaintiff guaranteed and warranted that, for a period as set forth in said contract, the

machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10° F. to within the limits of standard temperature controls.

24. The said refrigeration system installed by plaintiff was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

25. Within the period set forth in the contract, and upon ascertaining that the said equipment was defective and inadequate, Overmyer demanded of plaintiff that it make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and plaintiff wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

26. Upon the failure, neglect and refusal of plaintiff to complete the aforesaid contract and warranty, Overmyer was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

27. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while Overmyer was ignorant of such facts, it paid to plaintiff the sum of Two Hundred Twenty-three Thousand and Six Dollars ($223,006.00), the total amount which it was required to pay to plaintiff under the aforesaid contract, in the form of cash and installment note.

28. By reason of the foregoing facts, Overmyer has been damaged in the sum of Eighty-six Thousand Three Hundred Dollars ($86,300.00).

WHEREFORE, defendants pray that plaintiff's cause of action be dismissed, and that judgment be rendered for

defendant, Overmyer, against plaintiff in the sum of Eighty-six Thousand Three Hundred Dollars ($86,300.00), plus interest and for their costs herein expended.

BUGBEE & CONKLE

By /s/ ALLAN J. CONKLE
Allan J. Conkle
Attorneys for Defendants
2001 Toledo Trust Building
Toledo, Ohio 43604
Phone: 244-6788

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

G. R. Silcox says he is Vice-President for D. H. Overmyer Co., Inc., and Ohio corporation, and for D. H. Overmyer Co., Inc., a Kentucky corporation, and is duly authorized in the premises, and that the statements and averments contained in the foregoing answer and cross petition are true as he verily believes.

G. R. SILCOX

Sworn to before me and subscribed in my presence, this 31st day of July 1968.

GERALD N. GOLDBERG
Notary Public

Gerald N. Goldberg
Notary Public, State of New York
No. 31-6558320
Qualified in New York County
Commission Expires March 30, 1970

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Journal Entry

* * * * * * * * * *

This day this cause came on to be heard on the motions of the defendants to Stay Execution, for a New Trial and to Vacate Judgment and a demurrer to the petition and the same were submitted on the record, supporting memoranda, affidavits, exhibits and arguments of counsel.

Upon consideration thereof, and being fully advised in the premises the court finds that the Motion to Stay Execution, the Motion for a New Trial and the Motion to Vacate are not well taken. The court further finds that the demurrer is not well taken.

It is therefore, ORDERED, ADJUDGED and DECREED that the defendants' Motion to Stay Execution is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion for a New Trial is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion to Vacate Judgment is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' demurrer to the petition be overruled.

It is further ORDERED, ADJUDGED and DECREED that the Motion and Affidavit for examination of the debtors in aid of execution filed in this court on July 17, 1968, be in full force and effect and that any duly authorized officers of said corporations appear before this court at 10 AM on the 16th day of December, 1968 in courtroom # 3 and answer concerning all their assets including those items listed in the Motion and Affidavit filed in this court on July 17, 1968.

To so much of this order as is adverse to the interests of the defendants they object and except.

JOHN J. CONNORS, J.
Common Pleas Judge

Approved:

SHUMAKER, LOOP and KENDRICK
Shumaker, Loop and Kendrick
Attorneys for Plaintiff

BUGBEE and CONKLE
Bugbee and Conkle
Atttorneys for Defendants

Approved as to Form Only

Court of Appeals: Assignment of Error, No. 2

"It is a denial of Appellants' rights to due process under the State and Federal Constitutions to be denied an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term."

IN THE COURT OF APPEALS, LUCAS COUNTY, OHIO

CA No. 6552

Journal Entry

* * * * * * * * * * *

This cause came on to be heard on appeal on questions of law from the judgment of the Common Pleas Court, Lucas County, Ohio; and the same was submitted to this Court on the original papers, the record, the Bill of Exceptions, the Affidavits and Exhibits presented in the Common Pleas Court and arguments of counsel.

The Court, being fully advised in the premises, finds that the trial Court, with no abuse of discretion, properly overruled the defendants-appellants motion to vacate the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Common Pleas Court of Lucas County, Ohio, is affirmed at costs of the defendant-appellants; and the cause is remanded to that Court for execution of judgment.

To all of which defendants-appellants except.

CLIFORD F. BROWN
Judge of the Court of Appeals, Presiding

HARVEY G. STRAUB
Judge

JOHN W. POTTER
Judge

Filed
Court of Appeals
Sep. 22, 1969

Approved:

BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants-Appellants

SHUMAKER, LOOP & KENDRICK
JAMES M. TUSCHMAN
Attorneys for Plaintiff-Appellee

Ohio Supreme Court, Transcript of Record, p. III

Proposition of Law No. 5:

It is a violation of the right of trial by jury provided by *Section 5, Article I, of the Ohio Constitution* and of the right to due process of law provided by the *Four-*

teenth Amendment to the United States Constitution for a trial court to deny a jury trial to the maker of a note who tenders a validly stated defense against the original holder thereof who has taken a judgment on a warrant of attorney when the trial court refuses to take evidence on the merits of the defense before deciding whether to vacate the judgment.

Authorities cited in support of Proposition of Law No. 5:

Fourteenth Amendment to the United States Constitution

* * * * * * * * * * *

Sniadach v. *Family Finance Corporation of Bay View*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820, 37 Law week 4520 (1969)

The Supreme Court of the State of Ohio

1969 Term, To Wit: December 17, 1969 No. 69-720

JOURNAL 49, Page 677 APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its cost herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Ohio Revised Code

Section 2323.13 Warrant of attorney to confess.

"(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1435

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

PETITIONERS' REPLY BRIEF ON CERTIORARI

Four reasons assigned by respondent opposing review by this Court demonstrate the critical need for constitutional light in this dark and blighted area of constitutional jurisprudence. Respondent argues the merits of due process as applied below and of course this is the very purpose of the petition. This Court should fully consider the merits, with the aid of briefs from both sides.

Respondent argues (Br. 10-13) that petitioner's signature on the note was a waiver of the due process protection; but of course there never was a waiver of the right to fair and honest performance of respondent's obligation. Nor was there a waiver of meritorious defenses to a suit on the note.

Respondent's Point 4 (p. 14) argues that review should not be granted because "This is not a consumer protection or wage earner case." Respondent corporation is claiming that petitioner has no constitutional right to notice and hearing because it is a corporation. Such a distinction has never been sanctioned under the Fourteenth Amendment. Certainly, assumption of the corporate form shouldn't make this petitioner liable to pay for worthless goods, and strip it of defenses which other persons have before the law.

Actually, Overmyer is a small family company, heavily mortgaged, founded within the last ten years, and still owned and operated by a single individual and his immediate family. How "sophisticated" it is, as respondent claims (Br. 14), may be judged from its necessity and willingness to sign such a note as the one here in issue. It speaks here in a real sense for small business, struggling to live, fighting to preserve vital credit channels against the same kind of overreaching condemned so recently by this Court in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

Since the filing of the petition herein, counsel has learned of the pendency in Pennsylvania federal courts of two suits, under sponsorship of the Federal Government's Office of Economic Opportunity, seeking to declare unconstitutional precisely the same kind of cognovit note at issue here on the same grounds alleged in this case.

Awaiting imminent decision by a 3-judge court in the Eastern District is the case of *Swarb* v. *Lennox,* No. 69-2981, where the court has issued a preliminary injunction, after hearing, to bar execution on confession of judgment by natural persons, except with regard to mortgages. This is a class action by 40 named individual plaintiffs, for themselves and all others similarly situated. A decision is expected within the next week.

Identical action is pending in the Western District case of *Mallon* v. *Coon,* No. 70-503, where a similar injunction has been issued.

In the Eastern District the record shows over 52,000 judgments by confession were taken in Philadelphia in 1968, while the number recorded in 1969 was about 48,000. In the less populous Western District 26,432 judgments on confession were entered in 1968; and 25,944 were recorded in 1969.[1]

Since these cases have access to this Court as a matter of right on direct appeal (28 U.S. Code, § 1253), the matter is obviously of considerable consequence and virtually certain to engage this Court's consideration during the next term. Review by this Court will be in the highest public interest and national importance, providing a needed constitutional guide for all the States.

It is prayed that certiorari issue to bring this case up from the State Courts of Ohio in order that it may be considered at the same time, and in the same per-

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[1] Information and data on these cases was supplied by counsel for plaintiff via long distance telephone.

spective and principle, as the Pennsylvania cases now developing in the federal forum.

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69-5

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 127

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

MOTION TO POSTPONE CONSIDERATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1435

D. H. OVERMYER CO., INC., of Ohio,

and

D. H. OVERMYER CO., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

MOTION TO POSTPONE CONSIDERATION

After the filing yesterday, June 1, of Petitioner's Reply Brief on Certiorari, counsel was informed this morning by long distance telephone that the 3-judge District Court sitting in the Eastern District of Pennsylvania has filed an opinion on the merits of the Government's suit to declare unconstitutional confessions of judgment rendered on promissory notes without notice and hearing.

The Court holds such judgments are unconstitutional as to individuals earning under $10,000 per annum, provided, however, that if such notes are secured by real estate and serve the purpose of mortgages they will be upheld as valid without reference to the income of the maker.

The foregoing information is derived from long distance telephone conversation with Government counsel, who advises there is no statutory or other basis for the $10,000 line of demarcation. Nor is there statutory distinction between the status of notes given with security, and those without. It seems inevitable that the very grave constitutional issue here involved will be the subject of direct appeal at the next term of this Court.

WHEREFORE, petitioner moves the Court to defer and postpone consideration of its petition until it may be considered at the next term of Court with the parallel case just decided by the 3-judge Federal Court in the Eastern District of Pennsylvania which may have a very important bearing upon the prineiples controlling this case.

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June 2, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~197~~ 69-5

D. H. OVERMYER CO., INC., OF OHIO
and
D. H. OVERMYER CO., INC., OF KENTUCKY, *Petitioners*
v.
FRICK COMPANY, a Pennsylvania Corporation,
Respondent

On Certiorari to the Court of Appeals, Lucas County, Ohio

BRIEF FOR PETITIONERS

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AUTHORITIES CITED

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v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

On Certiorari to the Court of Appeals, Lucas County, Ohio

BRIEF FOR PETITIONERS

OPINIONS BELOW

There is no report of the 3-sentence opinion by the Ohio Court of Appeals. A copy is set forth in the form of a Journal Entry reproduced in the Appendix (App. 21-22). The Ohio Supreme Court did not write an opinion, but dismissed the Appeal *sua sponte* on the ground that, "no substantial constitutional question exists herein." (App. 24).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S. Code, Sec. 1257(3). Certiorari was granted March 29, 1971, and the time for filing this brief has been enlarged by the Court to July 27, 1971.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment Fourteen, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code, 2323.13:

> "(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.
>
> "(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

QUESTIONS PRESENTED

1. Does federal constitutional due process require notice and opportunity for hearing before entry of judgment? or may one party force the other in advance to surrender the constitutional right to notice and hearing as part of the consideration for the contract?

2. May State law authorize entry of judgment without notice to defendant, if it affords a subsequent hearing upon proof by the defendant that he has a meritorious defense?

3. May State law shift the burden of proof to the defendant in a civil action where judgment has been rendered without notice on warrant of attorney to confess?

STATEMENT OF THE CASE

Petitioners purchased from respondent a complete automatic refrigeration system to be installed by respondent in petitioner's warehouse in Toledo, Ohio, at a cost of $223,000. Payment was made in cash of some $92,000 and the execution of a promissory note in the amount of $130,977, due in twenty-one equal monthly installments with add-on interest (App. 6).

When the balance due had been reduced by approximately fifty per cent, to $62,370, the refrigerating plant failed completely to function. The warehouse sustained a loss of various foods in storage and the

entire cooling system had to be revised and renewed at very great cost to petitioners. Although the specifications called for automatic operation of the plant, respondent's failure to furnish a workable installation required petitioners to employ personnel to attend, maintain, and control the system at all times (App. 14-18).

While petitioners notified respondent of the need for repairs and modifications to comply with the contract and respondent's warranty, respondent refused and failed to take remedial measures, whereupon petitioner engaged others to do so (App. 16) and refused to make further payments as scheduled by the promissory note in question (App. 6). Respondent then proceeded to take judgment against petitioners in accordance with the so-called "cognovit" provision thereof (App. 7):

> The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this (sic) issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest
> * * *

An Ohio attorney, wholly unknown to petitioners, appeared and confessed judgment in favor of respondent for the sum of $62,370, plus interest and costs (App. 8). Neither process nor notice was given petitioners as to the commencement of suit or the designation of counsel for petitioners. Such counsel for petitioners did not communicate with his clients, did not inquire as to the existence of any possible defenses

or matter of reduction, offset, or counterclaim (App. 12-13). The only notice ever given petitioners was after the entry of judgment (App. 10).

Petitioners forthwith moved for new trial and to vacate judgment, setting forth by affidavits the lack of notice in entering judgment (App. 13), the collapse of the equipment, the damages and great cost of replacement, and sought to defend the action on the note by showing a failure of consideration and breach of contract by respondent (App. 12-19). A sworn answer accompanied the motion to vacate, showing the meritorious defense which was well known to respondent at the time it took the judgment (App. 13). Petitioners' motions were overruled and the Court confirmed its prior order for execution and discovery in aid thereof. (App. 20). Petitioners specifically asserted on appeal [Assignment of Error No. 2] a denial of due process by entry of judgment without notice and opportunity for hearing, and without possibility of presenting meritorious defenses (App. 21). Without discussion, the Court of Appeals held:

> the trial court, **with no abuse of discretion,** properly overruled the defendants-appellants motion to vacate the judgment. (Emphasis added).

The judgment was affirmed and the case remanded. (App. 21).

By appeal to the Supreme Court of Ohio, petitioners alleged denial of the federal constitutional right to due process of law by virtue of the entry of judgment without notice, and in the refusal to consider for trial a valid defense promptly tendered by petitioners after receiving notice of the judgment (App. 23). The Supreme Court of Ohio wrote no opinion, but or-

dered on its printed form, "The Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein." (App. 24). Thereafter this Court granted petitioners' application for certiorari to review the constitutional questions discussed herein.

SUMMARY OF ARGUMENT

There was neither service of process nor voluntary appearance by or for the defendants. The trial court therefore had no personal jurisdiction over petitioners.

The Ohio statute is unconstitutional as authorizing entry of judgment without notice and an opportunity to be heard.

No waiver of those constitutional rights by contract can be attributed to petitioners, because they couldn't know what defenses they would have in the future. Public policy militates against agreements to give up basic, fundamental rights and oust the courts of jurisdiction.

ARGUMENT

I. THE JUDGMENT BELOW IS INVALID UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT [1]

(A) There Is No Personal Jurisdiction Over the Defendant.

(1) There Was No Personal Service

In every concept of a valid judgment against a particular defendant there must be jurisdiction over the defendant *in personam*. Such jurisdiction is an exer-

[1] While this case involves the law of Ohio, there are others either on the docket of this Court, or moving through the lower courts, all involving the same questions. The legislation ranges from statutory approval to prohibition of the use of cognovits as a crime in several States. A resumé of the State laws is appended to this Brief as an Appendix.

tion of the court's authority over the defendant in a manner prescribed by law to bring the party into court. This is accomplished in one of two procedures: there must be either a service of process demanding that the party named appear and state his defense, or that party must make a voluntary appearance. Such is the law of the State of Ohio just as much as other States of the Union, and the State Supreme Court has reversed judgments on the ground that no jurisdiction had been obtained over the person of the defendants in the absence of service of process. *Baltimore & Ohio R. Co.* v. *Goodman*, 57 Ohio St. 641, 50 N.E. 1132 (1897); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 40 N.E. 201 (1895). In *Terry* v. *Claypool*, 77 Ohio App. 77, 65 N.E. 2d 883 (1945), the court expressly ruled there can be no valid judgment in personam unless the court has acquired jurisdiction over the person of the defendant either by service of process, or by his voluntary appearance. So says *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418 (1957).

This Court has fully recognized the rule in *Pennoyer* v. *Neff*, 95 U.S. 714, 732 (1877), and in the clearest terms reversed the judgment for want of jurisdiction, laying down fundamental rules in *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917):

> "The foundation of jurisdiction is physical power . . . . although submission to the jurisdiction by appearance may take the place of service upon the person . . . . Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice . . . . And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by pretty close adhesion to fact."

In *Turner* v. *Sawyer*, 150 U.S. 578, 583 (1893), the Court expressly set forth that there are only two ways a court can acquire personal jurisdiction over the person of a defendant to render a valid personal judgment: (1) by service of process whereby the defendant is brought into court against his will, or (2) by his own *voluntary* appearance and submission to the court's authority. *Accord: Mexican C. R. Co.* v. *Pinkney*, 149 U.S. 194, 200 (1893). Ohio law is the same: jurisdiction of the person may be obtained only by service of process, or by voluntary appearance. *Sears* v. *Weimer*, 10 Ohio Supp. 1 (1942), *affirmed*, 143 Ohio St. 312, 55 N.E. 2d 413 (1944).

On the same basis it is held that if the defendant is not served with process, or if the process be defective, "his voluntary appearance is essential in order that a valid personal judgment may be rendered against him." *Goldey* v. *Morning News*, 156 U.S. 518, 521 (1895).

In the case at bar the judgment admittedly is not rested upon service of any kind. None was issued.

(2) There Was No Appearance for Petitioners

The judgment rests solely upon appearance by an attorney, wholly unknown to petitioners, employed, paid and directed by respondent (plaintiff below), which attorney never communicated with petitioners (defendants), but waived issuance and service of process, and with knowledge of the facts, confessed, judgment for the amount demanded by plaintiff. Clearly this appearance is a violation of a proper attorney-client relationship, of the canons of legal ethics, and of basic standards of elementary fairness and common honesty. It is an utter nullity and does

not comport with this Court's standards to confer jurisdiction on the trial court.

It is axiomatic that "appearance" is an overt act by which a party comes into court and submits himself to its jurisdiction, and it is his first act therein. *Sharp* v. *Sharp,* 196 Kan. 38, 409 P. 2d 1019 (1966); *In re Samuelson,* 134 N.J.L. 573, 49 A. 2d 479 (1946); *Case* v. *Case,* 124 N.E. 2d 856, 860 (Ohio Prob. 1955); *McLaughlin* v. *Chicago, M., St. P. & P. R. Co.,* 23 Wis. 2d 592, 127 N.W. 2d 813 (1964); *Sands* v. *Lefcourt Realty Corp.,* 117 A. 2d 365 (Del. 1955).

It is clear that such acts of submission to the court's authority must be "voluntary", as this Court plainly said in *Pennoyer* v. *Neff, supra,* at p. 732, quoted and followed in *Wilson* v. *Seligman,* 144 U.S. 41, 44-45 (1892):

> "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or *by his voluntary appearance.*" (Emphasis added).

Whether or not an appearance is voluntary is obviously a matter depending upon the party's state of mind at the time of the appearance, not at some long prior date when the contract was signed. This question of volition is one an attorney cannot resolve without talking with his client, an event which did not take place between petitioners and the attorney who appeared for them. A similar question was raised in *Osborn* v. *Bank of United States,* 9 Wheat. 738,

829-31 (1824), where Chief Justice John Marshall noted that attorneys as members of the bar are presumably duly authorized to appear for their clients and need not make their authority a matter of record. If such authority should be required, it may be supplied as a matter of form.

> "It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it."

Nothing could be clearer than the rule that an unauthorized appearance does not confer jurisdiction. *Lucas* v. *Vulcan Iron Works,* 233 Fed. 823, 827 (M.D. Pa. 1961); *Ex parte Forbell,* 82 N.Y.S. 2d 109 (1948). Thus an attorney holding a general retainer for a corporation is unauthorized, without specific direction, to enter his client's appearance in a suit, and the client is not bound by the judgment. *King Construction Co.* v. *Mary Helen Coal Corp.,* 194 Ky. 435, 239 S.W. 799 (1922). The unauthorized attorney's acts are a nullity. *Gray* v. *First National Bank,* 388 Ill. 124, 57 N.E. 2d 363, 365-6 (1944). Similarly, an unauthorized suit to foreclose a mortgage, without the client's knowledge or consent does not give the court jurisdiction. *Courtney* v. *Campbell,* 143 Okl. 5, 286 Pac. 872 (1930). Likewise, a judgment against a defendant who was never served with process, and whose appearance was entered by an attorney without his knowledge or consent, would not be enforced. *Mills* v. *Scott,* 43 Fed. 452, 455 (S.D. Ga. 1890).

Recognizing the complete incapacity of counsel to act without express authority as a *sine qua non,* the Third Circuit carefully inquired and found the ap-

pearance in question to have been authorized in *Paradise* v. *Vogt Landische Maschinen-Fabrik,* 99 F. 2d 53, 55 (3d Cir. 1938).

In order to implement and emphasize the "voluntary" aspect of court appearances as submission to the judicial authority, it is plain that validity of an appearance depends wholly upon the party's intention. *Salmon Falls Mfg. Co.* v. *Midland Tire & Rubber Co.,* 285 Fed. 214, 218 (6th Cir. 1922); *Grable* v. *Killits,* 282 Fed. 185, 195 (6th Cir. 1922) *cert. denied* 260 U.S. 735 (1922); *Dahlgren* v. *Pierce,* 263 Fed. 841, 846 (6th Cir. 1920). In this context, an attorney's written acceptance of notice that the other side had filed a brief did not constitute an "entry of appearance." *E. L. Rice & Co.* v. *Pike,* 117 Ohio St. 521, 160 N.E. 90 (1927). An oral agreement of counsel, out of court, to a setting of the case for trial, did not so recognize the jurisdiction of the court as to constitute an entry of appearance. *Templeman* v. *Hester,* 65 Ohio App. 62, 29 N.E. 2d 216, 218 (1940):

It appears to be well recognized that a voluntary appearance, to be effectual, must be made with knowledge that a suit is pending and with a full intention to appear therein. *Crary* v. *Barber,* 1 Colo. 172 (1869); *Merkle* v. *Rochester,* 13 Hun. 157 (N.Y. 1878); *Weaver* v. *Stone,* 2 Grant Cas. 422 (Pa. 1853). Following the Sixth Circuit cases noted above, all of which came up from Ohio, the federal court in Ohio has categorically announced that waiver of service by appearance is always a matter of intention, and is not to be inferred, except as the result of facts from which an intent may be properly inferred. *Durabilt Steel Locker Co.* v. *Berger Mfg. Co.,* 21 F. 2d 139, 140 (N.D. Ohio, 1927). *Accord: Rhodes* v. *Rhodes,* 3 Mich. App. 397, 142

N.W. 2d 508 (1966). In Ohio the rule finds ready application. The Supreme Court of the State has held the defendant makes no appearance when his attorney writes to plaintiff's attorney asking him to dismiss the suit for lack of jurisdiction, and sending an unsigned carbon to the court. Since he asked nothing of the court, but only of opponent's counsel, it is held he made no appearance. *Litsinger Sign Co.* v. *American Sign Co.*, 11 Ohio St. 2d. 1 227 N.E. 2d 609, 621 (1967). *Accord: Rutherford* v. *Bentz*, 345 Ill. App. 532, 104 N.E. 2d 343 (1952). As indicating the primary importance of the party's intent, it is held that actual physical presence of a party in the courtroom during some phase of the proceeding does not constitute an appearance. *Austin* v. *State ex rel. Herman*, 10 Ariz. App. 474, 459 P. 2d 753 (1969).

Study of these cases plainly shows that there can be no valid appearance for a defendant who has no knowledge of the pending suit, and who has not authorized the specific attorney to represent him.

(a) *An attorney may not, as a matter of law and legal ethics, without his client's knowledge, accept employment, compensation, and instructions in the same case from his client's adversary, and his actions in so doing are not to be regarded as those of his nominal client.*

Happily the literature of the law records very few cases of attorneys who have attempted to carry water on both shoulders, serving two masters. The courts have been completely intolerant of such conduct as a matter of public policy. In *State* v. *Union National Bank*, 145 Ind. 537, 44 N.E. 585, 587 (1896), the court considered a very close parallel to the case at

bar. The Bank sued to have a receiver appointed for one Patton who lived in Ohio, and who was not served with process. An answer was prepared *by plaintiff's counsel,* and signed by one Rankin, purporting to be bookkeeper and attorney for Patton, confessing the facts alleged in the complaint. The answer was filed in court *by plaintiff's counsel* with the complaint. In reversing the action below, the Indiana court quoted from and followed *Pressley* v. *Harrison,* 102 Ind. 41, 1 N.E. 188, 192 (1885):

> "One party to an adversary proceeding cannot do anything, nor can be authorized to do anything by the other, which can give the court or judge jurisdiction over him, except as the statute has enacted. As the statute does not authorize, and **public policy forbids,** one party to appear for the other, it must be held that *where it appears, as here, that the only jurisdiction which the court or judge had over the defendant was such as was acquired through the agency of the plaintiff in appearing for him, the proceeding was without jurisdiction and void.* (Emphasis supplied).

On a direct parallel with that case it was held that a power of attorney given to plaintiff's attorney by defendant, authorizing him to enter her appearance, is void as against the policy of the law. *Ball* v. *Poor,* 81 Ky. 26, 4 Ky. Law Rep. 746 (1883).

It can require no argument or voice of counsel to establish the rule that an attorney owes his client a unique obligation of single-minded loyalty. Innumerable cases recognize the duty of counsel to be mindful of possible conflicts, not alone in the clear where the clients are adversaries, but where they are co-defendants. *Glasser* v. *United States,* 315 U.S. 60, 76 (1942). The courts have spoken with a unanimous judgment

on the subject. *Wilson* v. *Phend*, 417 F. 2d 1197, 1199-1200 (7th Cir. 1969); *Woodruff* v. *Cook*, 310 F. Supp. 280, 287 (N.D. Miss. 1970); *United States ex rel. Taylor* v. *Rundle*, 305 F. Supp. 1036, 1039 (E.D. Pa. 1969).

Professional standards of conduct for attorneys leave no room for argument or doubt that the client's interest alone is, and always must be, his single guiding star. Canon No. 6, of the American Bar Association Canons of Professional Ethics, is crystal clear on this subject:

> **Adverse Influences and Conflicting Interests**
>
> "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> *"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*
>
> *"The obligation to represent the client with undivided fidelity* and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." (Italics supplied).

It is plain that the attorney who entered an appearance for these petitioners was in no sense their attorney, but was only the agent and employee of respondent. He owed and recognized no obligation

of any kind, as attorney or otherwise, to petitioners. His actions were never those of petitioners, and were totally ineffective on any analysis to confer jurisdiction on the trial court.

(B) The Ohio Statute Authorizing Entry of Judgment Upon Warrant of Attorney, Without Notice to the Defendant or Opportunity To Be Heard, Is Unconstitutional for Want of Due Process of Law.

It is not open to doubt that the due process concept requires reasonable notice and opportunity to be heard. All parties concede this as fundamental. With extensive annotation this Court has very recently restated and applied this principle in invalidating a Connecticut statute. *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (March 2, 1971).

For purposes of the case at bar the problem is not so much procedural due process as it is a question of how far persons may require others to waive basic constitutional rights, surrender fundamental freedoms.[2] The decisions below held that petitioners surrendered all right to notice and hearing in connection with payment for the respondent's performance—no matter how shoddy that performance, how shabby the equipment furnished, no matter how far that performance fell short of contract obligations. In spite of the constitutional protection, it is decided below that petitioners must pay the contract price for a contract that was never performed, and they gave up in advance,

[2] So much attention has been drawn to the constitutionality of cognovit obligations as a credit instrumentality, that the proliferating litigation has generated a variety of legal discussions on the subject. A bibliography has been added to this Brief as an Appendix.

it is said, all right to assert that non-performance as a defense in this action.

The issue is a narrow one: it relates only to contract waiver, before suit has been filed, before any dispute has arisen. It does not relate to judgments based on consent of the parties after suit and service (Ohio R.C. Sec. 2323.12) nor does it concern default judgments entered after proper notice to the party defendant. See *Boddie* v. *Connecticut, supra,* at 378. **This case pertains only to judgments entered on warrant of attorney embodied in the original contract, whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice.**

Such contracts oust the courts of jurisdiction, and set at naught the basic constitutional protections of a free society, leaving the weak to be prey to the strong, the small to be trod under heel by the great, and the poor to be eviscerated for the sake of the rich; all in direct defiance of the saving mandate of the Fourteenth Amendment.

By the law of Ohio the banks, manufacturers, contractors, large department stores, all who extend credit to others, may insist that the contract authorize the creditor to take judgment against the debtor for default in payment, without notice, without opportunity to be heard, without counsel, in disregard of any and every defense the debtor may have.[8] The court is authorized to vacate the judgment upon a showing by

[8] Ohio Revised Code, Sec. 2323.13, *supra,* p. 2. A 1970 amendment to this statute requires such documents to spell this out *in haec verba;* it is quoted herein at p. 23, *infra.*

the debtor that it has a "valid defense,"[4] but this is "discretionary" with the trial judge, and, as in the case at bar (App. 21-22), refusal will not be disturbed on appeal.

The judgment entered under this statute is not different in operation or effect from a judgment rendered after protracted trial. Execution is immediately available[5] and the mere existence of the judgment constitutes a lien on all real estate of the judgment debtor.[6] While the court has power to open the judgment upon a proper showing,[7] the matter is "discretionary," and, as in the case at bar, the court's refusal will ordinarily not be disturbed on appeal.[8] Petitioners claim this procedure is wholly lacking in due process of law under the Fourteenth Amendment.

In the light of this Court's continuing exposition of the due process clause of the Fourteenth Amendment, it cannot be doubted that minimal standards of notice and an opportunity to be heard are required before State action may affect a person's "life, liberty, or property." Long ago this Court reversed a State court decision for lack of due process in rendering judgment against a foreign corporation after service on a resident director. In *Riverside & D. R. Cotton Mills* v.

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[4] See note 7, *infra*.

[5] App. 20.

[6] Sec. 2329.02, Ohio Revised Code.

[7] The debtor must show grounds "sufficient in law to constitute a valid defense." *Bellows* v. *Bonlus*, 83 Ohio App. 90, 82 N.E. 2d 429, 430 (1948).

[8] App. 21.

Menefee, 237 U.S. 189, 193, 196 (1915), Chief Justice White wrote for the Court:

> (193) "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement.
>
> (196) " . . . the very act of fixing by judicial action without a hearing a sum due, even though the method of execution be left open, would be, in and of itself a manifestation of power repugnant to the due process clause."

Extensive and learned treatises have been devoted to exposition of this concept. Virtually every term of this Court produces new and different challenges, but the old standards have great staying power. Thus, in *Goldberg* v. *Kelly,* 397 U.S. 254, 267-71 (1970), it was ruled that welfare recipients may not be deprived of their stipends without due process, spelling out the right to notice and an opportunity to be heard by the decisionmaker. This hearing must afford an opportunity to present evidence (pp. 267-68), to confront and cross-examine adverse witnesses (pp. 269-70), and to have the assistance of counsel if the party so chooses (pp. 270-71). Noting the procedure in the City of New York did not conform, this Court held:

> (p. 268) "These omissions are fatal to the constitutional adequacy of the procedures."

This Court long ago recognized the absolute right of a party in a fair hearing to introduce evidence. *Saunders* v. *Shaw,* 244 U.S. 317, 319 (1917). More recently, and with extensive review of authorities, this Court held unconstitutional a Connecticut statute conditioning access to the divorce courts upon payment of fees not available to women drawing public welfare

assistance, thereby denying fundamental constitutional rights of hearing guaranteed by the due process clause. *Boddie* v. *Connecticut*, 401 U.S. 371 (March 2, 1971).

The great landmarks of due process exposition chart a clear course for the present decision. Notice which is reasonable as to time must be afforded the defendant, *Roller* v. *Holly*, 176 U.S. 398, 413 (1900), and he must be given a meaningful opportunity to be heard. *Griffin* v. *Griffin*, 327 U.S. 220, 228 (1946); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *McDonald* v. *Mabee*, 243 U.S. 90, 92 (1917); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1914); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914).

Let it not be suggested that the power of the court to reopen the judgment upon a proper showing supplies ex post facto the constitutional protections otherwise so obviously lacking. In *Griffin* v. *Griffin, supra*, a New York decree for alimony was denied full faith and credit in the District of Columbia for lack of due process in failing to accord the defendant proper notice and opportunity to be heard. It was contended that he could move to set the decree aside and thus secure a hearing. Chief Justice Stone spoke for the Court:

> (p. 231) "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights. . . . Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment."

Of course, the Court will note that opening the judgment requires a demonstration by the defendant that he has "a valid defense." *Bellows* v. *Bowlus, supra* (p. 17, note 7). This completely shifts the burden of proof to the defendant, a result that fails to conform to constitutional standards. In short, presentation of the defense is prejudiced by the existence of the unlawful judgment. The precise question was involved in *Armstrong* v. *Manzo,* 380 U.S. 545, 551 (1965), invalidating a judgment of adoption for failure to give notice to the natural father. He sought to have it set aside, and, upon a hearing, the trial court held he had failed to prove he had not forfeited the right to object, denying his motion to vacate the adoption decree.

This Court held (380 U.S. at 550) the failure to give advance notice to the father "violated the most rudimentary demands of due process of law." The analysis is precisely the same as that of petitioners herein.

As to the curative value of the subsequent hearing, that shifted the burden of proof to petitioner on issues which would have had to be proved by his opponent if proper advance notice had been given, and it could not be accepted as a substitute for an orderly hearing in advance of judgment. The rule is directly applicable to this case where the reopening of the judgment depends upon the proof furnished by the defendant. The Court said:

> (p. 551) "The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser* v. *Randall,* 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution."

It is considered that *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969), is of controlling weight in this controversy. It was there held that a Wisconsin statute authorizing garnishment before judgment, without advance notice and hearing, was unconstitutional, even though the final decision was deferred to await trial.

> (p. 339) "But in the interim the wage earner is deprived of his employment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise."

Since garnishment without notice and hearing is condemned for lack of due process, then equally unconstitutional is judgment entered without such prerequisites for the immediate consequence of such judgment is execution, as in the case at bar (App. 20), by garnishment, attachment, and the fixing of liens on realty[9] —all deprivations of the kind condemned in *Sniadach*. Counsel for one of the largest finance companies fully admitted the perfect parallel in complete frankness:[10]

> In Wisconsin where . . . under the small loan law, judgments by confession are prohibited, garnishment procedure may proceed prior to judgment. It is doubtful therefore whether there is any real or practical difference . . . The guy's wages have been garnished without prior notice in either case!

It may be noted there was no difficulty about service on petitioners. The Petition on which the judgment in

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[9] Sec. 2329.02, Ohio Revised Code.

[10] Quoted in *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit.* Hopson, 29 Chi. L. Rev. 111, 121 (n. 63) 1961.

issue was rendered shows respondents knew the correct address of the resident petitioner in the City of Toledo, where the suit was filed. (App. 3). The only reason there was no service was that respondent well knew the action would be strongly defended, on meritorious grounds, and respondent wanted to cut off that defense. Obviously, the Ohio procedure is a prepotent device for securing a judgment, and collecting money without risking a defense. *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (2d Cir. 1952); 31 Ohio Jur. 2d, *Judgments*, § 139 (1958). Perfectly sound is the comment that this procedure "is the loosest way of binding a man's property that was ever devised in any civilized country." *Alderman, Bateman & Bateman* v. *Diament*, 7 N. J. L. 197, 198 (1824).

It seems clear that when a party causes the entry of judgment by concealing from the court the fact that the defendant has a good faith defense the procedure smacks of fraud, and the court itself is being used as an instrument of that fraud. *Cf. Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1914). But such is not the law of Ohio[11]—witness the recent legislative change following the filing of this case in this Court, and contemporaneous judicial condemnations of the practice, *e. g. Swarb* v. *Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970). Responding to the plainly justified complaint that many cognovit provisions are not understood, it is now required[12] that the instrument containing the warrant of attorney to confess judgment include the following in such type size or distinctive marking that it

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[11] *Hadden* v. *Rumsey Products, Inc., supra*, at p. 96.

[12] Amended Substitute Senate Bill No. 85, Approved June 17, 1970, effective September 16, 1970, amending Ohio Revised Code 2323.13.

appears more clearly and conspiciously than anything else on the document:

> "Warning—By Signing This Paper You Give Up Your Right to Notice and Court Trial. If You Do Not Pay on Time A Court Judgment May Be Taken Against You Without Your Prior Knowledge and the Powers of A Court Can Be Used to Collect From You or Your Employer *Regardless of Any Claims You May Have Against the Creditor Whether for Returned Goods, Faulty Goods, Failure on His Part to Comply with the Agreement, or Any Other Cause.*" (emphasis added).

There is no change in the law—the statute requires only that the consequences of the contract be made crystal clear to all who sign such an agreement: **"Judgment May Be Taken Against You Without Your Prior Knowledge."** Could there possibly be more of an annulment of the due process clause? And the *Sniadach Case* is not to be followed, for when this judgment is taken without your prior knowledge—"The Powers of A Court Can Be Used to Collect From you or Your Employer." All this without notice or opportunity to be heard. These are all being waived. But there is more! The signer is giving up any right to complain about a breach of contract, to credit for goods he has returned, for faulty goods. This is all but a waiver of citizenship!

As noted above, it is not a change in the law; merely a legislative exposition of the consequences of the cognovit contract. It seems to represent the strongest kind of argument for unconstitutionality of the clause.

(1) The Signing of a Cognovit Note Authorizing a Confession of Judgment is not an Advance Waiver of Due Process Rights to Notice and an Opportunity to be Heard.

Those who would defend the judgment below claim that petitioners waived the constitutional right to due process notice and opportunity to be heard. This seems to push too hard for the result desired, without regard to the true nature of a lawful waiver. It is elementary that waiver is "the intentional or voluntary relinquishment of a known right."[13] The authorities are unanimous that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). The rule applies as well to civil matters as to criminal. For example, this Court said clearly in *Ohio Bell Tel. Co.* v. *Public Utilities Comm.,* 301 U.S. 292, 307 (1937): "We do not presume acquiescence in the loss of fundamental rights." The same doctrine was announced and followed in *Aetna Insurance Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

If a waiver must be an intentional and voluntary relinquishment of known rights, it seems plain there can be no waiver before those rights are accrued and identifiable. Can it truly and fairly be said that the signer of a cognovit note surrendered all right to insist upon performance of the contract by the other party? Would he give up all right to complain for a breach? or to set off expenses of remedying such breach? to complain of fraud? or late performance? or deviations from important contract specifications? or failure to comply with local law and ordinances? Obviously these decisions cannot be made until a dispute has

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[13] Black's Law Dictionary (4th ed. 1962); *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 4 (1966).

arisen. Let there be no doubt petitioners recognize any man's right to waive another's default, to make equitable adjustments, to compose differences. But such waiver of rights can occur only when there has been a legal wrong, brought to the party's knowledge, and he then and there *intentionally* and *voluntarily,* for reasons sufficient at the time, decides to forego his known rights. If this analysis makes sense at all, the cognovit provision cannot be fairly construed to embrace relinquishment of rights which are unknown and unknowable at the time of contracting.

Presumably both parties intend to perform as required. The one who is receiving financial credit in the transaction fully intends to make payment, and he may, out of long custom, in accord with the universal practice in Ohio, sign a cognovit note. The limitations of this clause are perfectly plain and sensible: if the other party fully performs his contract and payment is not made as promised, he may enter judgment without notice. The debtor does not agree to the entry of judgment if there is no performance by the other party; or if that performance is so short of contract requirements that he has to engage others to remedy the defects and omissions. The waiver is clearly to be limited by, and conditioned upon, a proper and complete performance by the other party, nothing less.

On the other hand consider the Ohio Statute, the old § 2323.13 Ohio Revised Code, (p. 2, *supra*) and the amended form quoted above, (p. 23) both sanctioning a complete surrender of all contract rights.

Suppose respondent had written into the contract with petitioners a provision reciting that if the equipment should break down or fail to conform to specifications, petitioners agree never to bring court action for

damage; and if respondent should sue for any part of the purchase price unpaid, petitioners agree they shall have no notice or opportunity to be heard; and they waive the right to counsel of their own choice, but agree to let respondents select counsel for them, and authorize him to confess judgment for any amount demanded by respondent; waiving all right to produce evidence in their own defense, and surrendering the rights to confront and cross examine witnesses against them. Such an agreement should peremptorily call down the condemnation of this Court as a denial of fundamental freedoms guaranteed by the due process clause of the Fourteenth Amendment. *Goldberg* v. *Kelly, supra.*

The creditor would claim a waiver of those rights by contract. In the case at bar, however, the action complained of is the rendering of the judgment in conformity with the Ohio statute. It is thus clearly state action which must conform to the Fourteenth Amendment. *NAACP* v. *Alabama,* 377 U.S. 288 (1964); *Barrows* v. *Jackson,* 346 U.S. 249 (1952).

Recognizing the time of the alleged waiver as antecedent to all disputes between the parties, it is plain that petitioners would not voluntarily, intentionally and knowingly waive their right to defend upon a meritorious basis respondent's claims for payment. As a matter of policy it seems the court should refuse to enforce such thorough-going subversion of contract principles of right and fair-dealing.

Even more, it may be noted that the cognovit provision here in issue leaves the court no judicial function, but completely ousts it of jurisdiction. The court has no authority to inquire into the merits of the case, the volition of the parties in executing the contract, or

any other factor. It may only render judgment, even without inquiry as to the evidence to support the amount due. This has been roundly and soundly condemned because it reduces the judiciary to a mere clerical functionary, performing only ministerial functions in accordance with *ex parte* demands of the plaintiff. *First National Bank of Kansas City* v. *White,* 220 Mo. 717, 722, 120 S.W. 36, 42 (1909). Such ousters of judicial jurisdiction are considered contrary to public policy and not to be enforced. *Carbon Black Export, Inc.* v. *SS Monroza,* 254 F. 2d 297, 300-01 (5th Cir. 1958); *Gatliff Coal* v. *Cox,* 142 F. 2nd 876, 881 (6th Cir. 1944); *Cf. Swift & Co.* v. *Hocking Valley R. Co.,* 243 U.S. 281, 289 (1917).

Many cases may be found to limit contract provisions by which a party is forced to surrender various legal and constitutional rights. Such surrenders made in the face of litigation are clearly within a party's right, once he knows the problem and can appraise the alternatives. Petitioners especially urge that these legal and constitutional rights cannot be waived in advance as a condition of contracting. This Court invalidated a Wisconsin statute in *Insurance Company* v. *Morse,* 87 U.S. 445, 451 (1874), whereby insurers were required to agree, upon qualifying in Wisconsin, that they would not remove any suit to a federal court. The court recognized the choice of a party to waive rights, to consent to special procedures in each case as presented, but the *advance surrender* was held unlawful:

> (p. 451) A man may not barter away his life or his freedom, or his substantial rights . . . in these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however,*

bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned numerous cases may be cited to prove. (citations omitted) *They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.* (italics supplied)

The same rule has been announced and followed by the Supreme Court of Ohio in *Myers* v. *Jenkins,* 63 Ohio St. 101, 120, 57 N.E. 1089, 1093 (1900), where an insurance contract required adjustment of claims through the company alone and without resort to the courts.

This was held to be void and of no effect. The court recognized that a party whose rights have accrued may waive those rights or arbitrate.

"But a party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs . . . Courts are always open for the redress of wrongs and no person can, by contract in advance, deprive himself of the right to appeal to them."

A fair evaluation of the cognovit clause does not warrant the conclusion that the signer has waived all constitutional rights to "his day in court" under the due process clause of the Fourteenth Amendment, to notice and opportunity to be heard, to defend against unjustified claims, to be represented by counsel of his own choice, to produce evidence in his own defense, to confront and cross examine witnesses against him, and to have an impartial decisionmaker evaluate the rec-

ord and recide between the parties. These are rights too precious to be stripped out of contract relationships except under the most special circumstances. They represent basic rights guaranteed by the Constitution, and this Court should preserve them against State laws which would destroy their vitality. *Goldberg* v. *Kelly, supra,* 267-71.

Charles Dickens in 1837 wrote about Mrs. Bardell and her suit for breach of promise to marry, where her attorneys induced her to sign a cognovit for costs, which led to her being jailed without notice or opportunity to be heard. It may have been a commonplace at that time, but there was no Fourteenth Amendmena. Even so it was held in low repute.[14]

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[14] *Pickwick Papers,* Ch. 47:

"Now, Lowten," said little Mr. Perker, shutting the door, "what's the matter? No important letter come in a parcel, is there?"

"No, sir," replied Lowten. "This is a messenger from Mr. Pickwick, sir."

"From Pickwick, eh?" said the little man, turning quickly to Job. "Well, what is it?"

"Dodson and Fogg have taken Mrs. Bardell in execution for her costs, sir," said Job.

"No!" exclaimed Perker, putting his hands in his pockets and reclining against the sideboard.

"Yes," said Job. "It seems they got a cognovit out of her for the amount of 'em, directly after the trial."

"By Jove!" said Perker, taking both hands out of his pockets, and striking the knuckles of his right against the palm of his left emphatically. "Those are the cleverest scamps I ever had anything to do with!"

"The sharpest practitioners I ever knew, sir," observed Lowten.

"Sharp!" echoed Perker. "There's no knowing where to have them."

CONCLUSION

In the absence of personal service, and without an authorized appearance for petitioners, the judgment of the Court of Common Pleas was rendered against petitioners in violation of the due process clause of the Fourteenth Amendment, since the court lacked jurisdiction *in personam*. The Ohio Statute is therefore unconstitutional as a violation of the due process clause in sanctioning judgment without notice or opportunity for hearing.

The mere signature on a cognovit contract clause in advance of any dispute, cannot fairly be construed to import a waiver of basic constitutional rights under the due process clause.

It is concluded the judgment below is without lawful foundation, and petitioners pray the Court to reverse and remand the cause with appropriate directions.

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APPENDICES

(1) Bibliography of Law Review Literature:

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Laitos, *The Effect of Full Faith and Credit on Cognovit Judgments.* 42 Univ. of Colo. L. Rev. 173 (1970)

Leonard, *Confessions of Judgment: The Due Process Defects.* 43 Temple Law Q. 279 (1970)

Note: *Full Faith and Credit—Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney.* 54 Univ. of Va. L. Rev. 1970

Note: *Should a Cognovit Judgment Validly Entered in One State Be Recognized by a Sister State?* 30 Md. U. Law Rev. 350 (1970)

Schuchman, *Confession of Judgment as a Conflict of Laws Problem.* 4 Notre Dame Lawyer 46 (1961)

Toomepuu, Comment, *Cognovit Judgments and the Full Faith and Credit Clause,* 50 Boston Univ. L. Rev. 330 (1970)

(2) Resume of State Laws:

No pattern of State legislation may be found on the subject of confessions of judgment. Treatment varies from outright prohibition as a misdemeanor in Indiana, New Mexico and Rhode Island, to express statutory approval in Ohio, Illinois and Pennsylvania. In between are found silent tolerance and close regulation, with limitations on execution, and some prohibitions in small loans and consumer sales.

The tabulation below covers the situation as disclosed by research, though it appears much State legislation has been generated by this Court's decision in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and some revision may be required.

State	Status of Confession of Judgment	Statute
Alabama	—not permitted by contract before suit. —prohibited in small loans.	Ala. Code tit. 20, § 16 tit. 62, § 248 (1967)
Alaska	—not authorized, not prohibited.	Alaska Stat. § 09.30.050 (1962)
Arizona	—not permitted in small loans. —not authorized by contract before debt is due.	Ariz. Rev. Stat. § 6-629 § 44-143 (1956)
Arkansas	—authorized only upon personal appearance.	Ark. Stat. Ann. § 29-301 (1947)

State	Status of Confession of Judgment	Statute
California	—prohibited in conditional sales of motor vehicles, and retail instalment sales or small loans; otherwise authorized generally.	Cal. Civ. Code § 2983.7 (1968); § 1804.1 (1959); § 1132 (1965); Cal. Fin. Code § 18673; § 22407; § 24468; § 12318
Colorado	—prohibited in motor vehicle sales.	Colo. Rev. Stat. § 13-16-6 (1963)
Connecticut	—prohibited in small loans and instalment sales.	Conn. Gen. Stat. § 42-88; § 36-236
Delaware	—fully authorized, except for retail sales.	Del. Code Ann. tit. 10, § 3903; tit. 6-4311
Florida	—void if executed before action is brought. —prohibited in small loans.	Fla. Stat. § 55.05; § 516.16
Georgia	—permitted only after suit; prohibited in small loans.	Ga. Code, § 110-601; § 25-315
Hawaii	—prohibited on small loans and instalment sales; otherwise allowed on debts up to $1,000.	Hawaii Rev. Stat. tit. 34, § 633-3; tit. 22, § 409-15; tit. 26, § 416-13
Idaho	—prohibited on small loans only, otherwise authorized.	Idaho Code, § 26.2039; § 10-901
Illinois	—fully authorized.	Ill. Stat. Ann. Ch. 110, § 50
Indiana	—void if executed before cause of action accrued—use is misdemeanor.	Ind. Stat. § 2-2904; § 2-2906
Iowa	—permitted except on small loans.	Iowa Code, § 676.1-2; § 536.12
Kansas	—authorized on personal appearance in court.	Kan. Stat. § 61-105
Kentucky	—prohibited before action instituted. —prohibited in small loans and motor vehicle sales.	Ky. Rev. Stat. § 372.140 § 190.100

State	Status of Confession of Judgment	Statute
Louisiana	—prohibited before obligation comes due. —prohibited on small loans.	La. Const. Art. 7, § 4; La. Stat. § 6-585
Maine	—prohibited only on small loans and home repair contracts.	Me. Rev. Stat. tit. 9, § 3084, § 3724
Maryland	—prohibited in small loans, retail sales, otherwise authorized.	Md. Code, Art. 58A, § 19
Massachusetts	—generally prohibited.	Mass. Gen. Laws Ch. 231, § 13A
Michigan	—prohibited in retail sales or small loans. —authorized otherwise if on separate document.	Mich. Comp. L. § 445.864; § 493.12; § 600.2906
Minnesota	—prohibited in small loans and motor vehicle sales. —otherwise authorized.	Minn. Stat. § 56.12; § 168.71; § 548.22
Mississippi	—prohibited if executed before suit filed.	Miss. Code § 1545
Missouri	—fully authorized.	Mo. Stat. § 511.100
Montana	—authorized if made in person after suit filed, but void if providing for warrant of attorney.	Mont. Rev. Code § 93-9401; §13-811
Nebraska	—authorized by warrant of attorney, but not on personal loans by commercial lenders.	Neb. Rev. Stat. § 25-1312; § 8-823, § 8-447
Nevada	—authorized, except on small loans.	Nev. Rev. Stat. § 17.090, § 675.350
New Hampshire	—prohibited in small loan and motor vehicle sales.	N.H. Rev. Stat. § 361-A:7, § 399-A:5
New Jersey	—prohibited.	N. J. Stat. Ann. § 2A:16-9
New Mexico	—prohibited; use is a misdemeanor.	N.M. Stat. § 21-9-16; § 21-9-18
New York	—prohibited on instalment sales up to $1,500. and small loans and motor vehicle sales.	N.Y. Civ. Pr. L. & R. § 3201; Banking Law § 353; § 570 Personal Property Law § 302

State	Status of Confession of Judgment	Statute
North Carolina	—prohibited only on small loans.	No. Car. Gen. Stat. § 53-181
North Dakota	—prohibited on retail instalment sales.	N. Dak. Cent. Code § 51-13-02
Ohio	—fully authorized, but effective Sept. 16, 1970, instrument must contain warning of consequences.	Ohio Rev. Code § 2323.13
Oklahoma	—permitted, but not in consumer sales or loans.	Okla. Stat. tit. 12, § 689, § 690; tit. 14A, § 2-415, § 3-407
Oregon	—permitted, but not in motor vehicle sales, or debt consolidation contract.	Ore. R.S. § 26.110; § 83.070; § 697.733
Pennsylvania	—fully authorized.	Pa. Stat. tit. 12, § 739
Rhode Island	—prohibited on small loans; use is a misdemeanor.	R.I. Gen. Laws, § 19-25-24, § 19-25-36
South Carolina	—permitted, except on small loans.	S.C. Code, § 10-1535; § 8-800.13
South Dakota	—permitted.	S. Dak. Comp. L. § 21-26-1
Tennessee	—void if given before suit filed and process served.	Tenn. Code § 25-201
Texas	—void if given before suit filed.	Tex. Civ. Stat. Art. 2224
Utah	—permitted, except in consumer sales.	Utah Code, Ch. 18 (Uniform Commercial Credit Code)
Vermont	—prohibited in consumer contracts, otherwise permitted.	Vt. Stat. tit. 12, § 4671; tit. 9, § 2456
Virginia	—permitted, but not in small loans, specific attorney must be named in warrant to confess.	Va. Code § 8-355 et seq. § 6.1-284

State	Status of Confession of Judgment	Statute
Washington	—permitted, except on small loans.	Wash. Rev. Code § 4.60.050; § 31.08.150
West Virginia	—permitted, except on small loans.	W. Va. Code, § 56-4-48; § 7A-1
Wisconsin	—permitted, except on small loans.	Wis. Stat. § 270.69; § 214.14
Wyoming	—permitted only after suit and by personal appearance.	Wyo. Stat. § 1-309; § 1-312

In the District of Columbia there is no specific Congressional enactment on the subject, but a decision of the Supreme Court of that City (now the United States District Court), in a valuable and learned opinion by Mr. Justice Stafford, declined to enforce the terms of a cognovit note. That decision appears to represent the law of the District at this time. *Columbia Sand & Gravel Co.* v. *Stresbitt Tile Co.*, 56 Washington Law Reporter 82, 88 (1928).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 69-5

D. H. OVERMYER CO., INC., OF OHIO

and

D. H. OVERMYER CO., INC., OF KENTUCKY,

Petitioners

v.

FRICK COMPANY, A PENNSYLVANIA CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, LUCAS COUNTY, OHIO

BRIEF FOR RESPONDENT

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INDEX

Citations

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LUCAS COUNTY, OHIO

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the Common Pleas Court (A. 20), the decision of the Court of Appeals of Lucas County (A. 21-22) affirming the judgment of the Common Pleas Court, and the order of the Supreme Court of Ohio (A. 24) dismissing petitioners' appeal, are not reported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3). The order of the Supreme Court of Ohio was entered December 17, 1969. The Petition for a Writ of Certiorari was filed April 16, 1970, pursuant to order of Mr. Justice Potter Stewart enlarging time to that date, and was granted March 29, 1971.

STATUTES INVOLVED

The relevant provisions of the Ohio Revised Code regulating confessions of judgment are set forth in the Appendix, *infra,* pp. 19-20.

QUESTIONS PRESENTED

1. Whether petitioners were deprived of property without due process of law by a confession of judgment pursuant to Ohio procedure, when

(a) the business enterprise which includes the petitioner corporations, with the assistance and advice of counsel, knowingly, intelligently, and voluntarily, in a typewritten contract negotiated specifically for this transaction, waived the right to notice and to a hearing prior to the entry of judgment, without purporting to waive any other rights (such as the right to move to vacate the judgment and the right to appeal); and

(b) the consideration for petitioners' waiver of notice and pre-judgment hearing included respondent's release of existing liens against petitioners' property; and

(c) petitioners obtained an extensive hearing subsequent to judgment in which the validity of their defense was considered and adjudicated.

2. Whether the federal question now urged was timely raised in the state courts.

STATEMENT

The petitioner corporations are two parts of a warehousing enterprise described in the record by one of its counsel as having "in three years built 180 warehouses in thirty states" (A. 30) and which in this matter acted through various corporations.[1]

Since the identity of specific Overmyer corporations is not relevant to the federal constitutional issues, the entire enterprise (including petitioners and affiliated corporations) is referred to herein as "Overmyer."

1. Overmyer defaulted in payment to Frick under the original construction subcontract.

The transactions resulting in the judgment against Overmyer commenced with a subcontract between respondent Frick Company ("Frick") and an Overmyer affiliate corporation, guaranteed by another Overmyer corporation, for the installation by Frick

[1] The construction subcontract was between Frick Company and Nixon Construction Company, a wholly owned subsidiary of Green & White Construction Company, Inc. (A. 44). Payment to Frick was guaranteed by D. H. Overmyer Warehouse Company. The stock of Green & white Construction Company, Inc. was purchased in January 1967 by D. H. Overmyer Co., Inc., (A. 44), not otherwise identified in the record. The first installment note was executed by The Overmyer Company, Inc., a New York corporation (A. 51). The second installment note was executed by the two petitioners, D. H. Overmyer Co., Inc., an Ohio corporation, and D. H. Overmyer Co., Inc., a Kentucky corporation (A. 7).

of refrigeration equipment in a warehouse under construction in Toledo, Ohio. Overmyer repeatedly failed to make progress payments to Frick (A.33-34, 45-48) and to other subcontractors (A. 44). In early October 1966, Frick discontinued work because of Overmyer's default, but stated a willingness to accept $35,000 in cash then offered by Overmyer "provided the balance can be evidenced by interest-bearing judgment notes" (A. 49). On November 3, 1966, Frick filed three mechanic's liens against the Toledo warehouse property in the total amount of $194,031.00, the balance due to Frick from Overmyer.

2. The first installment note provided for extended payments and retained Frick's mechanic's liens.

Three months later, in January 1967, Overmyer obtained Frick's agreement to reschedule the defaulted payments and finish the work if 10 percent of the past-due balance ($19,403.10) were paid in cash and the remainder paid in 12 equal monthly installments with interest at 6½ percent. Overmyer accordingly executed the first installment note, delivered February 7, 1967 (A. 53), requiring monthly payments of $15,498.23.

The first note (A. 51-52) contained no confession of judgment clause. In the text of the note Overmyer expressly recognized that the "mechanics lien[s]" would continue "in full force" except that Frick would forego enforcement of its lien rights "so long as there is no default under this Note" (A. 52).

Frick completed the installation and, after a demonstration of the machinery and equipment, Overmyer formally "accepted" the work "as per the contract conditions" (A. 54).

3. Overmyer requested a second extension of payments after Frick's work had been formally accepted.

Subsequent to Overmyer's acceptance of the completed installation, Overmyer requested both a further extension of time in which to make payment and a release by Frick of the mechanic's liens against the Toledo warehouse (A. 38-39). Discussions between Overmyer and Frick resulted in an agreement that Overmyer would execute the second installment note (the note on which judgment was taken) in the amount of $130,977, requiring payment of the outstanding amounts due Frick in 21 monthly installments ending March 1969, instead of 12 installments ending February 1968, as provided in the first note, thus reducing Overmyer's monthly payments from the $15,498.23 required by the first note to $6,891.85. The second note also reduced the rate of interest on the indebtedness from 6½% to 6%.

4. Frick released its mechanic's liens in consideration of the confession of judgment clause in the second installment note.

The understanding between the parties, pursuant to which the second installment note was delivered (A. 59-60), and the text of the second note itself (A. 6-7) required Frick to release its mechanic's liens against the Toledo warehouse. Instead of the mechanic's lien security, Frick obtained (a) the confession of judgment clause (which had not been included in the first installment note) and (b) two second mortgages on Overmyer properties in Tampa and Louisville.

Although the understanding reached between the presidents of the two organizations was confirmed by

letter dated June 23, 1967 from Overmyer's general counsel to Frick's counsel (A. 59-60), the executed original of the second installment note, a short, typewritten document (A. 6-7), was not delivered until three-months later on October 2, 1967. Delivery was made by letter signed by general counsel for Overmyer (Edmund M. Connery, Esquire, of counsel for petitioners in this Court).[2] Frick released the three mechanic's liens on November 3, 1967 (A. 39).

5. Overmyer sued unsuccessfully in New York to prevent entry of judgment following its intentional default under the second note.

On June 1, 1968, Overmyer intentionally defaulted in making payment of the installment due under the second note (A. 76), and contemporaneously commenced an action against Frick in the United States District Court for the Southern District of New York, seeking to enjoin the entry of judgment under the second installment note on the ground that Frick had breached the original subcontract (A. 61-79). Overmyer presented no evidence except a conclusory affidavit made by its New York trial counsel (A. 74-76). An *ex parte* stay order against Frick was vacated (A. 70-72, 78-79) and Overmyer's motion for an injunction was subsequently denied (A. 81-83). The District Court concluded:

> "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, the extensive documentary evidence furnished by defendant [Frick] indicates that the plaintiffs'

[2] The note and Mr. Connery's transmittal letter are typed in the same typeface, apparently on the same typewriter.

[Overmyer's] action lacks merit." (A. 83) (per Mansfield, J.)

6. The judgment against Overmyer in Ohio was followed by hearing and adjudication of Overmyer's defenses.

Subsequent to the order in New York vacating the *ex parte* stay order, Frick on July 12, 1968, entered judgment against Overmyer in the Common Pleas Court of Lucas County, Ohio, the county in which the Toledo warehouse is located, in the amount of $62,370.00 with interest and costs. Notice of the judgment was mailed to Overmyer at five locations by the Clerk, pursuant to Ohio statute (A. 1-2, 10).

On July 22, 1968, Overmyer filed motions to stay execution (A. 2, 30) and for a new trial (A. 2, 11). Both parties submitted affidavits and a hearing was held in the Common Pleas Court on August 15, at which time the opinion of the United States District Court was read into the record (A. 28) and Overmyer was granted time to file "whatever you want" (A. 29). On August 6, 1968, Overmyer filed a motion to vacate the judgment (A. 2, 13) and tendered an answer and counterclaim (A. 2, 13-19). A second hearing was held September 5, 1968 (A. 30).

No issue of federal or state constitutional due process was raised in the Common Pleas Court. Overmyer urged instead that "partial failure of consideration" was a defense to the note (A. 79). Frick urged that the consideration for the second installment note (on which the judgment had been taken) consisted of (a) the release of the three existing mechanic's liens, (b) the extension of time to 21 months from

12 months for payment of the debt due, (c) the reduction to 6 percent of the 6½ percent rate of interest in the first installment note (A. 38-42), all of which had been fully performed by Frick, and that any claims which Overmyer might assert arising from the original construction subcontract could not, as a matter of Ohio contract law, constitute a valid defense to Overmyer's obligations under the second installment note. Frick further contended that Overmyer's alleged claims under the original subcontract were barred both by Overmyer's acceptance (A. 54) and by the warranty limitations in the subcontract (A. 43).

By order entered November 16, 1968 the Common Pleas Court "on the record, supporting memoranda, affidavits, exhibits, and arguments of counsel" (A. 20) held that Overmyer's various motions were "not well taken" and overruled each motion.

Overmyer appealed to the Court of Appeals for Lucas County, Ohio, and for the first time attempted to raise a federal constitutional issue of denial of due process, stated in its "Assignment of Error, No. 2" to consist of the purported denial of "an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term" (A. 21). The Court of Appeals held, on the basis of the entire record, including "the Affidavits and Exhibits presented in the Common Pleas Court," that the lower court had, "with no abuse of discretion, properly overruled the defendant-appellant's motion to vacate the judgment" (A. 22).

Overmyer then appealed to the Supreme Court of Ohio, and argued, among other issues, that:

> "It is a violation of the right of trial by jury provided by Section 5, Article I, of the Ohio Constitution and of the right to due process of law provided by the Fourteenth Amendment to the United States Constitution for a trial court to deny a jury trial to the maker of a note who tenders a validly stated defense against the original holder thereof who has taken a judgment on a warrant of attorney when the trial court refuses to take evidence on the merits of the defense before deciding whether to vacate the judgment" (A. 23).

The Supreme Court dismissed the appeal and the petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

A. Overmyer's waiver of the rights to notice and hearing is effective because done voluntarily and intelligently with awareness of the likely consequences. *Brady* v. *United States*, 397 U.S. 742. Uncertainty as to future events does not vitiate an otherwise intelligent waiver. *Ibid.* Having induced Frick to release mechanic's liens in consideration for the second instalment note containing the confession of judgment clause, Overmyer is estopped to challenge the validity of the judgment taken on the note. *Shepard* v. *Barron*, 194 U. S. 553.

B. Recent decisions support the right of a party to a contract to waive notice, *National Equipment*

Rental, Ltd. v. *Szukhent,* 375 U.S. 311, and to waive a hearing otherwise required by due process. *Boddie* v. *Connecticut,* 401 U.S. 371. A contrary result in this case involving corporate property rights would be wholly inconsistent with decisions giving effect to waivers in cases involving personal liberty.

C. Petitioners' failure to raise any constitutional issue in the Common Pleas Court appears to deprive this Court of jurisdiction to review the judgment below, since Ohio requires that such issues be presented to the trial court. Ohio does not recognize uncertainty in the law as an excuse for non-compliance, even if such an uncertainty had been present in the instant case.

ARGUMENT

A. The record establishes a voluntary and knowing waiver of Overmyer's rights to notice and hearing.

Since no issue of denial of due process was raised by Overmyer in the Common Pleas Court, Frick had no occasion to present evidence directed specifically to the issue of Overmyer's waiver of those due process rights. The affidavits and documents now in the record (A. 31-78) were introduced to persuade the Ohio court, as similar materials had earlier persuaded the District Court in New York, that Overmyer's defenses were not meritorious.

Nonetheless, the instant record does show an effective waiver by Overmyer of its rights to notice and to a hearing, consistent with the strict standard applied by this Court to test the validity of waivers in criminal prosecutions, as recently restated in *Brady* v. *United States,* 397 U.S. 742, 748:

> "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

Each part of that standard is satisfied in the instant case.

Overmyer's waiver was wholly voluntary. The transaction effected by the second installment note conferred substantial benefits on Overmyer with no apparent benefit to Frick. This is not a case of a contract of adhesion. Frick did not refuse to deal with Overmyer unless Overmyer agreed to execute a confession clause. To the contrary, the first installment note contained no such provision. Measured by the holdings of *Brady*, 397 U.S. at 755 (guilty plea not invalid for lack of voluntariness merely because entered to avoid possibility of death penalty), or *North Carolina* v. *Alford*, 400 U.S. 25 (guilty plea voluntary despite protestation of innocence), there can be no reasonable doubt of the voluntariness of Overmyer's waiver affecting only corporate property rights.

The record equally establishes that Overmyer's waiver was knowing, intelligent, and done with sufficient awareness of the consequences. Overmyer does not contend that its general counsel did not understand the consequences of his delivery of the judgment note to Frick. Instead, Overmyer appears to argue that no waiver is valid at the inception of a transaction because future events may not be foreseen (Brief for Petitioners pp. 24-25). This argument may have weight as to many consumer transactions in which notes are signed before home repairs are commenced or retail merchandise delivered, but hardly

applies to the instant case in which the second note was delivered six months after Frick's work had been formally accepted by Overmyer.

Even if certain events could not have been predicted by Overmyer at the time of delivery of the note, such uncertainty does not vitiate the waiver. Decisions of this Court have consistently upheld the waiver of substantial rights, notwithstanding proof that such waiver was based on an erroneous prediction of future events. The waiver which results from a guilty plea is "intelligently made" even if based "on a faulty premise." *Brady* v. *United States,* 397 U.S. 742, 757 (guilty plea entered to avoid death penalty is effective notwithstanding subsequent declaration of unconstitutionality of death penalty section of Federal Kidnapping Act); *McMann* v. *Richardson,* 397 U.S. 759, 772-73 (guilty plea based on New York procedure respecting jury determination of voluntariness of coerced confession is effective notwithstanding subsequent declaration of unconstitutionality of that procedure).

Overmyer's conduct in persuading Frick to release the three mechanic's liens in consideration of the confession of judgment clause also brings this case within the rule that constitutional rights, intended for the protection of property, may be lost by estoppel as well as by express waiver. *Shepard* v. *Barron,* 194 U.S. 553, 568-69. The record shows that Frick reasonably desired security for the indebtedness owed by Overmyer and that Frick regarded the confession of judgment provision as equivalent, for these purposes, to the mechanic's liens. Having obtained Frick's consent to the exchange, Overmyer "upon general principles of justice and equity"

should not be allowed to claim that the action "taken upon the faith of [its] request, should be held invalid. . . ." *Shepard* v. *Barron,* 194 U.S. at 568 (assessment under "void" statute enforced against landowners who obtained improvement to their properties).

B. The due process rights of notice and hearing are subject to waiver by a corporation.

The rights to notice and hearing created by the Fourteenth Amendment language that no person shall be deprived of property without due process of law are rights subject to waiver. Both *Swarb* v. *Lennox,* 314 F. Supp. 1091 (E.D. Pa. 1970), and *Osmond* v. *Spence,* 327 F. Supp. 1349 (D. Del. 1971), despite records showing the difficulty in consumer transactions of establishing valid waiver, held nonetheless that a waiver could be effective even as to individuals signing printed form contracts in consumer transactions. The court stated in *Swarb* v. *Lennox,* in language relevant to the involvement of general counsel for Overmyer in the instant case:

> "Where the debtor is an attorney, all that may be necessary to prove that he understood the meaning and consequences of such a clause in a consumer financing note is an affidavit of such a debtor's profession." 314 F. Supp. at 1100-01.

The Court in *Osmond* v. *Spence* referred to "the settled proposition that an individual can, under specified conditions, waive a constitutional right such as notice and hearing. . . ." 327 F. Supp. at 1358. (Footnote omitted.)

Even without consent, this Court has upheld procedures which are similar in many respects to a limited power to confess judgment. Summary action to control prices in time of war, "subject to later judicial review of its validity," was upheld in *Yakus* v. *United States,* 321 U.S. 414, 442, as "justified by compelling public interest. . . ."

Immediate collection of taxes by summary administrative proceedings has been upheld on the ground that "where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips* v. *Commissioner,* 283 U.S. 589, 597. Similar procedures resulting in the creation of a lien on all property of the defendant as the result of state administrative action were sustained on the ground that the state procedure allowed "a reasonable opportunity to be heard and to present the defense" by the filing of an affidavit, *Coffin Bros. & Co.* v. *Bennett,* 277 U.S. 29, 31 (assessment against stockholders of closed bank).

Seizure and expenditure of the assets of an individual, without actual or constructive notice, upon his wife's affidavit that he is an absconding husband, has been sustained an an "ancient" procedure. *Corn Exchange Bank* v. *Coler,* 280 U.S. 218, 222.

In each of the foregoing cases some public interest was involved. However, in *Ownbey* v. *Morgan,* 256 U.S. 94, 112, "certain rather harsh legislation of the State of Delaware," *Corn Exchange Bank* v. *Coler,* 280 U.S. at 223, providing that a defendant in an action of foreign attachment could not assert his defenses without entering security "was sustained be-

cause of the origin and antiquity of the provisions," 280 U.S. at 223, in a case in which the defendant was unable to obtain security. In *McKay* v. *McInnes,* 279 U.S. 820, validity of foreign attachment without bond or affidavit was affirmed without opinion, a holding recently cited for the proposition that a "procedural rule that may satisfy due process for attachments in general, see *McKay* v. *McInnes,* 279 U.S. 820, does not necessarily satisfy procedural due process in every case." *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 340 (different rule required for attachment of wages). Unlike the wages involved in the *Sniadach* case, the property involved in the instant case deserves no greater protection than required "for attachments in general."

On the basis of these authorities, the State of Ohio would appear to be free, either for some public purpose or to protect private litigants, as in foreign attachment, to adopt a procedure which would allow the creation of a lien against Overmyer's property without Overmyer's consent and impose significant burdens upon Overmyer in a post-judgment hearing to determine Overmyer's defenses. But the instant case is, of course, one in which Overmyer, voluntarily and intelligently, did all that was necessary voluntarily to waive its due process rights, if those rights are subject to waiver. Petitioners contend that this case involves two specific due process rights, (a) the right to notice, and (b) the right to a hearing prior to judgment.

In recent decisions this Court has considered as settled the right of an individual to waive either or both of these rights.

In *National Equipment Rental, Ltd.* v. *Szukhent,* 375 U.S. 311, 315-16, the rule was stated to be "settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or *even to waive notice altogether,*" (emphasis added), citing among other authorities *Bowles* v. *J. J. Schmitt & Co.,* 170 F. 2d 617 (2d Cir. 1948). In that case the Court of Appeals (Augustus N. Hand, Clark and Frank, Circuit Judges) upheld a judgment confessed without notice in a District Court, despite lack of any statutory basis therefor, when the confessed judgment had been entered in an amicable injunction proceeding commenced against the same defendant.

In another recent decision, *Boddie* v. *Connecticut,* 401 U.S. 371, 378, the Court stated unequivocally that "the hearing required by due process is subject to waiver. . . ." 401 U.S. at 378-379.

Any holding that the property rights involved in the instant case are not subject to a voluntary and intelligent waiver would create an anomalous contrast to numerous holdings involving personal liberty. *E.g., Illinois* v. *Allen,* 397 U.S. 337, 342-43 (waiver by conduct of right to be present at criminal trial); *Miranda* v. *Arizona,* 384 U.S. 436, 444 (recognizing power to waive right to counsel and right against self incrimination); *Fay* v. *Noia,* 372 U.S. 391, 439 (waiver of habeas corpus); and *Rogers* v. *United States,* 340 U.S. 367, 372-73 (waiver by conduct of right against self incrimination).

C. No federal question was timely raised in the state courts.

Petitioners admittedly failed to raise any federal constitutional question in the Common Pleas Court,

notwithstanding ample opportunity. Since the Supreme Court of Ohio refuses to consider constitutional issues which are not raised in the trial court, this Court would appear to lack jurisdiction to review the judgment below. *Cardinale* v. *Louisiana,* 394 U.S. 437, 439; *Beck* v. *Washington,* 369 U.S. 541, 550.

The Supreme Court of Ohio strictly applies the rule that "one who complains of error must give the trial court a chance to avoid error by calling the court's attention to any alleged error." *State* v. *Lynn,* 5 Ohio St. 2d 106, 108, 214 N.E. 2d 226, 229-30 (1966). "It is fundamental that one cannot sit idly by while an error is committed by the trial court and then later complain of that error. To so hold would promote useless litigation that could have been promptly cut short by a correct ruling in the trial court." 5 Ohio St. 2d at 108, 214 N.E. 2d at 230. Ohio follows *Ansbro* v. *United States,* 159 U.S. 695, 698, holding that "an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below. . . ." Nor does Ohio recognize uncertainty in the law as a valid excuse for non-compliance. *City of Toledo* v. *Reasonover,* 5 Ohio St. 2d 22, 213 N.E. 2d 179 (1965). In the *Reasonover* case a failure to object to the prosecutor's comment on a criminal defendant's failure to testify, occurring prior to *Griffin* v. *California,* 380 U.S. 609, was held not excused.

There was in the instant case, moreover, no decision of this Court overruling a line of authority relevant to confessed judgments between the time of hearings in the Common Pleas Court and petitioners' appeal to the Court of Appeals, in which a constitutional issue was first raised, or any other excuse to avoid the application of the trial court rule.

CONCLUSION

For the reasons stated the judgment below should be affirmed or the writ dismissed for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE.

(As in effect on July 12, 1968, the date of the judgment)

§ 2319.03 Use of affidavit. (GC § 11523)

An affidavit may be used to verify a pleading, to prove the service of the summons, notice, or other process in an action; or to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.

§ 2323.13 Warrant of attorney to confess.

(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition.

§ 2325.07 Proceedings prior to vacation. (GC § 11637)

A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action. When a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

§ 2325.08 Enforcement of judgment may be suspended. (GC § 11638)

The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings on the whole or a part thereof, to be granted by the court or a judge thereof, when it is rendered probable, by affidavit, or by exhibition of the record, that such party is entitled to a vacation or modification of such judgment or order.

D. H. OVERMYER CO., INC., OF OHIO ET AL. v. FRICK CO.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, LUCAS COUNTY

No. 69-5. Argued November 9, 1971—Decided February 24, 1972

After a corporation (Overmyer) had defaulted in its payments for equipment manufactured and being installed by respondent company (Frick), and Overmyer under a post-contract arrangement had made a partial cash payment and issued an installment note for the balance, Frick completed the work, which Overmyer accepted as satisfactory. Thereafter Overmyer again asked for relief and, with counsel for both corporations participating in the negotiations, the first note was replaced with a second, which contained a "cognovit" provision in conformity with Ohio law at that time whereby Overmyer consented in advance, should it default in interest or principal payments, to Frick's obtaining a judgment without notice or hearing, and issued certain second mortgages in Frick's favor, Frick agreeing to release three mechanic's liens, to reduce the monthly payment amounts and interest rate, and to extend the time for final payment. When Overmyer, claiming a contract breach, stopped making payments on the new note, Frick, under the cognovit provision, through an attorney unknown to but on behalf of Overmyer, and without personal service on or prior notice to Overmyer, caused judgment to be entered on the note. Overmyer's motion to vacate the judgment was overruled after a post-judgment hearing, and the judgment court's decision was affirmed on appeal against Overmyer's contention that the cognovit procedure violated due process requirements. *Held:* Overmyer, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, and on the facts of this case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate Overmyer's Fourteenth Amendment rights. Pp. 182–188.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which all members joined, except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case. DOUGLAS, J.,

filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 188.

Russell Morton Brown argued the cause and filed a brief for petitioners.

Gregory M. Harvey argued the cause for respondent. With him on the brief was *James M. Tuschman*.

Franklin A. Martens filed a brief for the Ohio State Legal Services Assn. et al. as *amici curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13.[1]

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[1] When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, 133 Ohio Laws 196–198 (1969–1970), effective Sept. 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other

The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.[2] It was known at least as far back as Blackstone's time. 3 W. Blackstone, Commentaries *397.[3] In a case applying Ohio law, it was

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evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"'Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.'"

[2] The Iowa Supreme Court succinctly has defined a cognovit as "the written authority of the debtor and his direction . . . to enter judgment against him as stated therein." *Blott* v. *Blott*, 227 Iowa 1108, 1111–1112, 290 N. W. 74, 76 (1940).

In *Jones* v. *John Hancock Mutual Life Insurance Co.*, 289 F. Supp. 930, 935 (WD Mich. 1968), aff'd, 416 F. 2d 829 (CA6 1969), Judge Fox, in applying Ohio law, pertinently observed:

"A cognovit note is not an ordinary note. It is indeed an extraordinary note which authorizes an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due. Such a judgment may be taken by any person or any company holding the note, and it cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it."

[3] Historical references appear in *General Contract Purchase Corp.* v. *Max Keil Real Estate Co.*, 35 Del. 531, 532–533, 170 A. 797, 798 (1933), and *First Nat. Bk.* v. *White*, 220 Mo. 717, 728–732, 120 S. W. 36, 39–40 (1909).

said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (CA2 1952). And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." *Alderman* v. *Diament*, 7 N. J. L. 197, 198 (1824). Mr. Dickens noted it with obvious disfavor. Pickwick Papers, c. 47. The cognovit has been the subject of comment, much of it critical.[4]

Statutory treatment varies widely. Some States specifically authorize the cognovit.[5] Others disallow it.[6]

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[4] Recent Cases, Confession of Judgments—Refusal of New York State to Enforce Pennsylvania Cognovit Judgments, 74 Dick. L. Rev. 750 (1970); Note, Enforcement of Sister State's Cognovit Judgments, 16 Wayne L. Rev. 1181 (1970); H. Goodrich, Conflict of Laws § 73, p. 122 (4th ed. 1964); Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U. Chi. L. Rev. 111 (1961); Hunter, The Warrant of Attorney to Confess Judgment, 8 Ohio St. L. J. 1 (1941); Note, A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC, 35 U. Cin. L. Rev. 470 (1966); Comment, The Effect of Full Faith and Credit on Cognovit Judgments, 42 U. Colo. L. Rev. 173 (1970); Comment, Confessions of Judgment: The Due Process Defects, 43 Temp. L. Q. 279 (1970); Comment, Cognovit Judgments and the Full Faith and Credit Clause, 50 B. U. L. Rev. 330 (1970); Comment, Cognovit Judgments: Some Constitutional Considerations, 70 Col. L. Rev. 1118 (1970); Note, Confessions of Judgment, 102 U. Pa. L. Rev. 524 (1954); Note, Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney, 56 Va. L. Rev. 554 (1970); Note, Should a Cognovit Judgment Validly Entered in One State be Recognized by a Sister State?, 30 Md. L. Rev. 350 (1970).

[5] Ill. Rev. Stat., c. 110, § 50; Mo. Rev. Stat. § 511.100; Ohio Rev. Code § 2323.13; Pa. Stat. Ann., Tit. 12, §§ 738 and 739 and Pa. Rules of Civil Procedure 2950–2976; S. D. Comp. Laws § 21–26–1.

[6] See, for example, Ala. Code, Tit. 20, § 16, and Tit. 62, § 248;

Some go so far as to make its employment a misdemeanor.[7] The majority, however, regulate its use and many prohibit the device in small loans and consumer sales.[8]

In Ohio the cognovit has long been recognized by both statute and court decision. 1 Chase's Statutes, c. 243, § 34 (1810); *Osborn* v. *Hawley*, 19 Ohio 130 (1850); *Marsden* v. *Soper*, 11 Ohio St. 503 (1860); *Watson* v. *Paine*, 25 Ohio St. 340 (1874); *Clements* v. *Hull*, 35 Ohio St. 141 (1878). The State's courts, however, give the instrument a strict and limited construction. See *Peoples Banking Co.* v. *Brumfield Hay & Grain Co.*, 172 Ohio St. 545, 548, 179 N. E. 2d 53, 55 (1961).

This Court apparently has decided only two cases concerning cognovit notes, and both have come here in a full faith and credit context. *National Exchange Bank* v. *Wiley*, 195 U. S. 257 (1904); *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287 (1890). See *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932).

I

The argument that a provision of this kind is offensive to current notions of Fourteenth Amendment due process is, at first glance, an appealing one. However, here, as in nearly every case, facts are important. We state them chronologically:

1. Petitioners D. H. Overmyer Co., Inc., of Ohio, and D. H. Overmyer Co., Inc., of Kentucky, are segments of a warehousing enterprise that counsel at one point in

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Ariz. Rev. Stat. Ann. §§ 6–629 and 44–143; Mass. Gen. Laws Ann., c. 231, § 13A; N. J. Stat. Ann. § 2A:16–9.

[7] Ind. Ann. Stat. §§ 2–2904 and 2–2906; N. M. Stat. Ann. §§ 21–9–16 and 21–9–18; R. I. Gen. Laws Ann. §§ 19–25–24 and 19–25–36.

[8] See, for example, Conn. Gen. Stat. Rev. §§ 42–88 and 36–236; Mich. Comp. Laws §§ 600.2906 and 493.12, Mich. Stat. Ann. §§ 27A.2906 and 23.667 (12); Minn. Stat. §§ 548.22, 168.71, and 56.12.

the litigation described as having built "in three years . . . 180 warehouses in thirty states." The corporate structure is complex. Because the identity and individuality of the respective corporate entities are not relevant here, we refer to the enterprise in the aggregate as "Overmyer."

2. In 1966 a corporation, which then was or at a later date became an Overmyer affiliate, executed a contract with the respondent Frick Co. for the manufacture and installation by Frick, at a cost of $223,000, of an automatic refrigeration system in a warehouse under construction in Toledo, Ohio.

3. Overmyer fell behind in the progress payments due from it under the contract. By the end of September 1966 approximately $120,000 was overdue. Because of this delinquency, Frick stopped its work on October 10. Frick indicated to Overmyer, however, by letter on that date, its willingness to accept an offer from Overmyer to pay $35,000 in cash "provided the balance can be evidenced by interest-bearing judgment notes."

4. On November 3 Frick filed three mechanic's liens against the Toledo property for a total of $194,031, the amount of the contract price allegedly unpaid at that time.

5. The parties continued to negotiate. In January 1967 Frick, in accommodation, agreed to complete the work upon an immediate cash payment of 10% ($19,403.10) and payment of the balance of $174,627.90 in 12 equal monthly installments with 6½% interest per annum. On February 17 Overmyer made the 10% payment and executed an installment note calling for 12 monthly payments of $15,498.23 each beginning March 1, 1967. This note contained no confession-of-judgment provision. It recited that it did not operate as a waiver of the mechanic's liens, but it also stated that Frick would forgo enforcement of those lien rights so long as there was no default under the note.

6. Frick resumed its work, completed it, and sent Overmyer a notice of completion. On March 17 Overmyer's vice president acknowledged in writing that the system had been "completed in a satisfactory manner" and that it was "accepted as per the contract conditions."

7. Subsequently, Overmyer requested additional time to make the installment payments. It also asked that Frick release the mechanic's liens against the Toledo property. Negotiations between the parties at that time finally resulted in an agreement in June 1967 that (a) Overmyer would execute a new note for the then-outstanding balance of $130,997 and calling for payment of that amount in 21 equal monthly installments of $6,891.85 each, beginning June 1, 1967, and ending in February 1969, two years after Frick's completion of the work (as contrasted with the $15,498.23 monthly installments ending February 1968[9] specified by the first note); (b) the interest rate would be 6% rather than 6½%; (c) Frick would release the three mechanic's liens; (d) Overmyer would execute second mortgages, with Frick as mortgagee, on property in Tampa and Louisville; and (e) Overmyer's new note would contain a confession-of-judgment clause. The new note, signed in Ohio by the two petitioners here, was delivered to Frick some months later by letter dated October 2, 1967, accompanied by five checks for the June through October payments. This letter was from Overmyer's general counsel to Frick's counsel. The second mortgages were executed and recorded, and the mechanic's liens were released. The note contained the following judgment clause:

> "The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judg-

ment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for the period of fifteen (15) days."

8. On June 1, 1968, Overmyer ceased making the monthly payments under the new note and, asserting a breach by Frick of the original contract, proceeded to institute a diversity action against Frick in the United States District Court for the Southern District of New York. Overmyer sought damages in excess of $170,000 and a stay of all proceedings by Frick under the note. On July 5 Judge Frankel vacated an *ex parte* stay he had theretofore granted. On August 7 Judge Mansfield denied Overmyer's motion for reinstatement of the stay. He concluded, "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit."

9. On July 12, without prior notice to Overmyer, Frick caused judgment to be entered against Overmyer (specifically against the two petitioners here) in the Common Pleas Court of Lucas County, Ohio. The judgment amount was the balance then remaining on the note, namely, $62,370, plus interest from May 1, 1968, and costs. This judgment was effected through the appearance of an Ohio attorney on behalf of the defendants (petitioners here) in that Ohio action. His appearance was "by virtue of the warrant of attorney" in the second note. The lawyer waived the issuance and service of process and confessed the judgment. This attorney was not known to Overmyer, had not been retained by Overmyer, and had not communicated with the petitioners prior to the entry of the judgment.

10. As required by Ohio Rev. Code § 2323.13 (C), the clerk of the state court, on July 16, mailed notices of the entry of the judgment on the cognovit note to Overmyer at addresses in New York, Ohio, and Kentucky.

11. On July 22 Overmyer, by counsel, filed in the Ohio court motions to stay execution and for a new trial. The latter motion referred to "[i]rregularity in the proceedings of the prevailing party and of the court . . . ." On August 6, Overmyer filed a motion to vacate judgment and tendered an answer and counterclaim alleging breach of contract by Frick, and damages. A hearing was held. Both sides submitted affidavits. Those submitted by Overmyer asserted lack of notice before judgment and alleged a breach of contract by Frick. A copy of Judge Mansfield's findings, conclusions, and opinion was placed in the record. On November 16 the court overruled each motion.

12. Overmyer appealed to the Court of Appeals for Lucas County, Ohio, specifically asserting deprivation of due process violative of the Ohio and Federal Constitutions. That court affirmed with a brief journal entry.

13. The Supreme Court of Ohio "sua sponte dismisse[d] the appeal for the reason that no substantial constitutional question exists herein."

We granted certiorari. 401 U. S. 992 (1971).

II

This chronology clearly reveals that Overmyer's situation, of which it now complains, is one brought about largely by its own misfortune and failure or inability to pay. The initial agreement between Overmyer and Frick was a routine construction subcontract. Frick agreed to do the work and Overmyer agreed to pay a designated amount for that work by progress payments at specified times. This contract was not accompanied by any promissory note.

Overmyer then became delinquent in its payments. Frick naturally refrained from further work. This impasse was resolved by the February 1967 post-contract arrangement pursuant to which Overmyer made an immediate partial payment in cash and issued its installment note for the balance. Although Frick had suggested a confession-of-judgment clause, the note as executed and delivered contained no provision of that kind.

Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession-of-judgment provision Overmyer now finds so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate.

Were we concerned here only with the validity of the June 1967 agreement under principles of contract law, that issue would be readily resolved. Obviously and undeniably, Overmyer's execution and delivery of the second note were for an adequate consideration and were the product of negotiations carried on by corporate parties with the advice of competent counsel.

More than mere contract law, however, is involved here.

III

Petitioner Overmyer first asserts that the Ohio judgment is invalid because there was no personal service upon it, no voluntary appearance by it in Ohio, and no genuine appearance by an attorney on its behalf. Thus,

it is said, there was no personal jurisdiction over Overmyer in the Ohio proceeding. The petitioner invokes *Pennoyer* v. *Neff*, 95 U. S. 714, 732 (1878), and other cases decided here and by the Ohio courts enunciating accepted and long-established principles for *in personam* jurisdiction. *McDonald* v. *Mabee*, 243 U. S. 90, 91 (1917); *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418 (1957); *Sears* v. *Weimer*, 143 Ohio St. 312, 55 N. E. 2d 413 (1944); *Railroad Co.* v. *Goodman*, 57 Ohio St. 641, 50 N. E. 1132 (1897); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 491, 40 N. E. 201, 203 (1895).

It is further said that whether a defendant's appearance is voluntary is to be determined at the time of the court proceeding, not at a much earlier date when an agreement was signed; that an unauthorized appearance by an attorney on a defendant's behalf cannot confer jurisdiction; and that the lawyer who appeared in Ohio was not Overmyer's attorney in any sense of the word, but was only an agent of Frick.

The argument then proceeds to constitutional grounds. It is said that due process requires reasonable notice and an opportunity to be heard, citing *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971). It is acknowledged, however, that the question here is in a context of "contract waiver, before suit has been filed, before any dispute has arisen" and "whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice." [9] In other words, Overmyer's position here specifically is that it is "unconstitutional to waive in advance the right to present a defense in an action on the note." [10] It is conceded that in Ohio a court has the

[9] Petitioners' Brief 16.

[10] Tr. of Oral Arg. 17.

power to open the judgment upon a proper showing. *Bellows* v. *Bowlus*, 83 Ohio App. 90, 93, 82 N. E. 2d 429, 432 (1948). But it is claimed that such a move is discretionary and ordinarily will not be disturbed on appeal, and that it may not prevent execution before the debtor has notice, *Griffin* v. *Griffin*, 327 U. S. 220, 231–232 (1946). *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), are cited.

The due process rights to notice and hearing prior to a civil judgment are subject to waiver. In *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311 (1964), the Court observed:

> "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." 375 U. S., at 315–316.

And in *Boddie* v. *Connecticut*, *supra*, the Court acknowledged that "the hearing required by due process is subject to waiver." 401 U. S., at 378–379.

This, of course, parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved. *Illinois* v. *Allen*, 397 U. S. 337, 342–343 (1970) (right to be present at trial); *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay* v. *Noia*, 372 U. S. 391, 439 (1963) (habeas corpus); *Rogers* v. *United States*, 340 U. S. 367, 371 (1951) (right against compulsory self-incrimination).

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, *Brady* v. *United States*, 397

U. S. 742, 748 (1970); *Miranda* v. *Arizona*, 384 U. S., at 444, or "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Fay* v. *Noia*, 372 U. S., at 439, and even if, as the Court has said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937), that standard was fully satisfied here.

Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many States and has been party to "tens of thousands of contracts with many contractors." This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from Overmyer came into being, it, too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed.

Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision. Indeed, it could not do so in the light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the progress payments, was executed without it. It appeared in the second note delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer. Particularly important, it would seem, was the

release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time, and interest rate.

Overmyer may not have been able to predict with accuracy just how or when Frick would proceed under the confession clause if further default by Overmyer occurred, as it did, but this inability does not in itself militate against effective waiver. See *Brady* v. *United States*, 397 U. S., at 757; *McMann* v. *Richardson*, 397 U. S. 759, 772–773 (1970).

We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.

Insurance Co. v. *Morse*, 20 Wall. 445 (1874), affords no comfort to the petitioners. That case concerned the constitutional validity of a state statute that required a foreign insurance company, desiring to qualify in the State, to agree not to remove any suit against it to a federal court. The Court quite naturally struck down the statute, for it thwarted the authority vested by Congress in the federal courts and violated the Privileges and Immunities Clause.

Myers v. *Jenkins*, 63 Ohio St. 101, 120, 57 N. E. 1089, 1093 (1900), involving an insurance contract that called for adjustment of claims through the company alone and without resort to the courts, is similarly unhelpful.

IV

Some concluding comments are in order:

1. Our holding necessarily means that a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process. Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as

we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.

2. Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

3. Overmyer, merely because of its execution of the cognovit note, is not rendered defenseless. It concedes that in Ohio the judgment court may vacate its judgment upon a showing of a valid defense and, indeed, Overmyer had a post-judgment hearing in the Ohio court. If there were defenses such as prior payment or mistaken identity, those defenses could be asserted. And there is nothing we see that prevented Overmyer from pursuing its breach-of-contract claim against Frick in a proper forum. Here again that is precisely what Overmyer has attempted to do, thus far unsuccessfully, in the Southern District of New York.

The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE MARSHALL joins, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937); *Aetna Ins. Co.* v. *Kennedy*, 301 U. S.

389, 393 (1937), has been effectively rebutted by the evidence presented in this record. Whatever procedural hardship the Ohio confession of judgment scheme worked upon the petitioners was voluntarily and understandingly self-inflicted through the arm's-length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 32 Ohio Jur. 2d, Judgments § 558 (1958). In *Livingstone* v. *Rebman,* 169 Ohio St. 109, 158 N. E. 2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of a judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderance-of-the-evidence test, the trial court had found insufficient support for the debtor's claim and had dismissed the motion to open. On appeal, however, the Ohio Supreme Court reversed on the degree of proof needed to vacate a confessed judgment. Said the court:

> "[I]f there is credible evidence supporting the defense . . . from which reasonable minds may reach different conclusions, it is then the *duty* of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury or, if a jury is waived, by the court." *Id.,* at 121–122, 158 N. E. 2d, at 375. (Emphasis supplied.)

Thus it would appear that the Ohio confessed judgment may be opened if the debtor poses a jury question, that

is, if his evidence would have been sufficient to prevent a directed verdict against him. That standard is a minimal obstacle.*

The fact that a trial judge is *dutybound* to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate. See also *Goodyear* v. *Stone*, 169 Ohio St. 124, 158 N. E. 2d 376 (1959); *McMillen* v. *Willard Garage Inc.*, 14 Ohio App. 2d 112, 115, 237 N. E. 2d 155, 158 (1968); *Central National Bank of Cleveland* v. *Standard Loan & Finance*, 5 Ohio App. 2d 101, 104, 195 N. E. 2d 597, 600 (1964).

The record shows that the petitioners were given every opportunity after judgment to explain their affirmative defense to the state courts and that the defense was rejected solely because the evidence adduced in support thereof was too thin to warrant further presentation to a jury.

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*Thus the Ohio system places no undue burden of proof upon the debtor desiring to open a confessed judgment, in marked contrast to the Pennsylvania procedure involved in *Swarb* v. *Lennox*, *post*, p. 191. In Pennsylvania in order to vacate such a judgment, a borrower must prove his defense by the preponderance of the evidence rather than by merely mustering enough evidence to present a jury question. Once the judgment is vacated, moreover, he must again prevail by that standard at a subsequent trial. In effect, the Pennsylvania confessed debtor is required to win two consecutive trials, not simply one. Given the proclivities of reasonable men to differ over the probative value of jury questions, the Pennsylvania requirement of twice sustaining the preponderance of the evidence imposes a stiffer burden of persuasion.